Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

KISKA CONSTRUCTION CORPORATION - U.S.A. AND KAJIMA ENGINEERING AND CONSTRUCTION, INC., PARTNERS IN KISKA-KAJIMA, A JOINT VENTURE,

Petitioners,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the D.C. Circuit erred by rewriting the sovereign immunity provision of the WMATA Compact, an interstate Compact ratified by Congress pursuant to the Compact Clause, Art. I, § 10, cl. 3, to replace the governmental/proprietary distinction expressly set forth in that Compact with the concededly different discretionary/ministerial distinction set forth in the Federal Tort Claims Act.

2. Whether, in applying the discretionary/ministerial distinction, the D.C. Circuit erred by holding that WMATA has the "discretion" to commit fraud by withholding material information from its contractors, and that the exercise of such "discretion" is "grounded in economic, social, or political policy."

RULE 29.6 STATEMENT

Petitioner KiSKA Construction Corporation-U.S.A., a Delaware corporation, is wholly owned by KiSKA Developers, Inc., also a Delaware corporation, which in turn is wholly owned by Cannes Properties, Inc., a Cayman Islands corporation. No publicly held company holds a 10 percent or greater ownership interest in KiSKA Construction Corporation-U.S.A.

Petitioner Kajima Engineering and Construction, Inc., a California corporation, is wholly owned by Kajima Corp.-Japan, a publicly traded Japanese corporation. No other publicly held company holds a 10 percent or greater ownership interest in Kajima Engineering and Construction, Inc.

Petitioner KiSKA-Kajima is a joint venture of KiSKA Construction Corp.-U.S.A. and Kajima Engineering and Construction, Inc. No publicly held company holds a 10 percent or greater ownership interest in KiSKA-Kajima.

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INTRODUCTION

This case presents the question whether respondent Washington Metropolitan Area Transit Authority ("WMATA") is free to defraud its contractors with impunity by withholding material information regarding the difficulty of performing a construction contract to induce artificially low lump-sum bids. That question is answered in the negative by the WMATA Compact among the District of Columbia, Maryland, and Virginia, which created WMATA and was duly ratified by Congress in 1966 pursuant to the Compact Clause of the Constitution, Art. I, § 10, cl. 3. Section 80 of the Compact waives WMATA's sovereign immunity for torts "committed in the conduct of any proprietary function," but not for torts "occurring in the performance of a governmental function." Because withholding material information about a construction project to induce a contractor to submit a lump-sum bid far below any reasonable cost of performance is not remotely "governmental" in nature, one would think this would be an easy case for denying immunity.

The courts below, however, never even addressed this issue, because the D.C. Circuit in *Sanders v. WMATA*, 819 F.2d 1151 (1987), effectively rewrote Section 80 of the WMATA Compact to replace the textual governmental/proprietary distinction with the distinct discretionary/ministerial distinction of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(a). Whatever the relative merits of those two distinctions, there is no question that they are different. Indeed, that is the precise holding of this Court's seminal decision in *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), which squarely rejected an attempt to interpret the FTCA's discretionary/ministerial distinction by reference to the common-law governmental/proprietary distinction. What the D.C. Circuit did, plain and simple, was to rewrite the sovereign immunity provision of the WMATA Compact.

The court thereby violated the most fundamental tenets not only of federalism (since an interstate Compact is a contract among sovereign States) but also of separation of powers (since an interstate Compact is ratified by Congress). If there is any principle that is settled with respect to the Compact Clause, it is that federal courts must respect an interstate Compact's "express terms" and "are not free to rewrite it." *Texas v. New Mexico*, 462 U.S. 554, 564-65 (1983) (Brennan, J.). Because the D.C. Circuit manifestly violated this principle, because the interpretation of an interstate Compact is the solemn "function and duty of the Supreme Court of the Nation," *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951), and because the Fourth Circuit (the only other circuit likely to hear claims against WMATA) has (over a vigorous dissent) now decided to follow the D.C. Circuit on this point, *see Smith v. WMATA*, 290 F.3d 201 (2002), this Court's review is necessary and appropriate.

Indeed, wholly apart from the D.C. Circuit's manifest disregard for the plain language of the WMATA Compact, the decision below also warrants review for its startling application of the FTCA's discretionary/ministerial distinction. According to the D.C. Circuit, WMATA not only has the "discretion" to commit fraud by withholding material information from its contractors, but the exercise of such "discretion" is "grounded in economic, social, or political policy." Merely to state those points is to refute them. Under a Nation governed by the rule of law, government agencies do not have the "discretion" to commit fraud, and even if they did, the exercise of such "discretion" could not possibly be deemed a legitimate "policy" choice.

At the end of the day, it is impossible to overstate the radical nature of the decision below. The D.C. Circuit has given WMATA *carte blanche* to commit fraud with impunity. In an era when public trust of government is at a low ebb, it is hard to imagine a more perverse ruling. The courts may not always be

perfect instruments of justice, but neither should they affirmatively be transformed into instruments of injustice. Because the decision below is not even arguably rooted in the text of the WMATA Compact, and creates an incentive for governmental abuse, this Court should grant *certiorari* and reverse the judgment.

OPINIONS BELOW

The D.C. Circuit's decision is reported at 321 F.3d 1151 and reprinted in the Appendix ("App.") at 1a-22a. The district court's unpublished order granting respondent's motion to dismiss petitioners' tort claims is reprinted at App. 23a-29a.

JURISDICTION

The D.C. Circuit issued its decision on March 11, 2003. App. 1a. The Chief Justice granted an extension of the time for filing this petition to and including July 9, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Compact Clause of the Constitution provides:

> No State shall, without the Consent of the Congress, ... enter into any Agreement or Compact with another State.

U.S. Const. Art. I, § 10, cl. 3.

Section 80 of the WMATA Compact provides in pertinent part:

> Liability for Contracts and Torts
>
> The Authority shall be liable for its contracts and for its torts and those of its Directors, officers, employees and agents committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory (including rules on conflict of laws), but shall not be liable for any

> torts occurring in the performance of a governmental function.

WMATA Compact, *codified at* D.C. Code § 9-1107.01(80); Va. Code Ann. § 56-529(80); Md. Code Ann., Transp. § 10-204(80).

STATEMENT OF THE CASE

This case arises out of a project to build a subway tunnel for the Green Line under 14th Street in Washington, D.C.[1] In evaluating that project in the fall of 1992, respondent WMATA commissioned an outside technical expert, GZA GeoEnvironmental, Inc. ("GZA"), to prepare a Tunnel Alternative Report ("TAR") to analyze the subsurface conditions in the project area and recommend an appropriate tunneling method. App. 34a. In November 1992 and January 1993, GZA prepared two TARs for the 14th Street tunnel project that concluded—among other things—that the soil in the project area could not effectively be dewatered, and hence required the use of certain specialized (and expensive) tunneling machinery. App. 36a-40a.

In particular, the first TAR reported that "[g]roundwater for most of the [tunnel] alignment is anticipated to be above the crown [top of the tunnel] with the exception of the last few hundred feet where the groundwater will probably be approximately at spring line [the tunnel' s midpoint]," and that, in light of these soil conditions, "even ... fairly extensive dewatering" was not likely to be "[e]ffective." App. 37a. The second TAR was, if anything, even more emphatic on this score, insisting that "[w]e do not believe the majority of the soils along this alignment can be effectively dewatered ....

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[1] Because the district court dismissed petitioners' tort claims on the pleadings, the factual allegations of the complaint must be accepted as true, *see Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 508 n.1 (2002)—a point that the D.C. Circuit expressly acknowledged, *see* App. 8a & n.7.

Dewatering, if attempted, would, in our opinion, be costly and probably ineffective." App. 39a.

Notwithstanding these recommendations by its own experts, WMATA wanted to use a faster and less expensive tunneling method than GZA recommended, because otherwise the bids would be too high for WMATA to afford the project. Accordingly, after reviewing the second TAR, WMATA's Board of Engineers met with GZA. App. 40a. At WMATA's insistence, GZA thereafter issued a third TAR, which authorized the use of less expensive tunneling machinery, but cautioned that "[e]xtensive dewatering will be an essential element" of using such machinery. App. 40a-41a. And GZA still expressed reservations about the feasibility of that option, emphasizing that "effective dewatering of the alignment is *at best* going to be difficult," and should be attempted only in conjunction with an "extensive" soil stabilization program. App. 41a-42a (emphasis added). Indeed, in a startling (and telling) departure from industry practice, GZA insisted that WMATA agree to hold GZA harmless if the dewatering system dictated by WMATA proved insufficient. *See* D.C. Cir. App. 590.

WMATA thus knew, months before soliciting bids on the project, that an extensive dewatering and soil stabilization plan was going to be necessary on the project. App. 43a. Accordingly, WMATA directed GZA to design a dewatering system that would "absolutely" lower the groundwater table in the project area, and GZA produced a design consisting of approximately 319 dewatering wells. App. 48a; *see also* D.C. Cir. App. 1045-46. GZA also advised WMATA to give the contractor exclusive control over the design and implementation of a soil stabilization plan. App. 51a. In light of the wet soil in the project area, WMATA's design consultants estimated that approximately 400,000 cubic feet of pre-support chemical grout would be necessary. App. 53a.

On December 6, 1993, WMATA issued an Invitation For Bids ("IFB") on the 14th Street tu el project. App. 32a. The contract documents, including the I 3, set forth detailed design specifications, and required bidders to submit lump-sum bids for carrying out the job *based on those specifications*. App. 32a-33a.[2] The design specified in the contract documents, including the IFB, however, deviated materially from GZA's recommendations. In particular, the design cut far back on the dewatering program recommended by GZA—it provided for only 61 dewatering wells (about *one quarter* the recommended number), and only 110,000 cubic feet of pre-support chemical grouting (again, about o*ne quarter* the recommended amount). App. 46a-48a, 53a-54a.

Based on the GZA reports and GZA's insistence on a hold-harmless provision, WMATA thus knew that its design specifications were inadequate to get the job done. Nonetheless, WMATA adopted those defective specifications to induce contractors to submit binding lump-sum bids for far less than the actual cost of performance—in effect, deceiving its bidders into subsidizing the project. To accomplish this scheme, WMATA actively concealed from the bidders its knowledge that its design specifications were inadequate to dewater and stabilize the soil for effective tunneling. In particular, *WMATA concealed all of GZA's reports on subsurface conditions at the project site, as well as GZA's related recommendations*. App. 35a, 48a, 53a-54a. At the same time, WMATA selectively included much older and obsolete reports on subsurface conditions in the project area, thereby creating a false impression—squarely inconsistent with the GZA reports and reality—that the defective design specifications could get the job done. WMATA falsely stated

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[2] "A design specification describes in precise detail the materials to be employed and the manner in which the construction work is to be performed." App. 4a n.4 (citing *P.R. Burke Corp. v. United States*, 277 F.3d 1346, 1357 (Fed. Cir. 2002)).

that these reports were being provided "in order that the contractor may have the *same information as is available to [WMATA]*." App. 34a-35a (emphasis added).

In reliance on WMATA's incomplete and misleading information, petitioners KiSKA Construction Corporation-U.S.A. and Kajima Engineering and Construction, Inc., partners in a joint venture, KiSKA-Kajima (collectively "KiSKA") submitted a lump-sum bid on the project for $42,905,000. App. 33a, 55a. After finding that KiSKA was the lowest responsive and responsible bidder, WMATA accepted that bid, and, in early 1994, the two parties signed a contract. App. 33a. Thereafter, KiSKA had no choice but to perform the contract pursuant to WMATA's detailed design specifications. App. 55a.

KiSKA made every reasonable effort to implement WMATA's prescribed dewatering system, retaining an experienced dewatering subcontractor, initiating dewatering processes as quickly as possible and months before the planned start of tunnel excavation, monitoring groundwater tables, and informing WMATA of the results of that monitoring. App. 55a-56a. Nevertheless, just as GZA had predicted, WMATA's limited dewatering and soil stabilization design failed to lower the groundwater table sufficiently for tunneling with the specified machinery. App. 56a. The project was thus a fiasco as KiSKA encountered substantial amounts of water in the tunnel—with groundwater infiltrating the tunnel at rates as fast as 50 gallons per minute—causing the specified machinery to malfunction and KiSKA to incur substantial delay, disruption, safety risks, and financial harm. App. 58a-60a. Indeed, the soil remained so saturated, muddy, and unstable that use of the contractually specified machinery became futile and KiSKA was often forced to excavate the tunnel *by hand*. App. 59a.

KiSKA eventually completed the project at a cost of almost *double* its $43 million lump-sum bid. App. 67a. Although WMATA accepted all work under the contract, and today the

Green Line runs through KiSKA's tunnel, WMATA refused to pay KiSKA for the tens of millions of dollars in losses caused by WMATA's tortious inducement of KiSKA to submit an artificially low bid on the contract, and its subsequent breach of that contract.

Accordingly, KiSKA brought this lawsuit. The complaint contains five counts: (I) Fraudulent Misrepresentation/ Fraudulent Inducement of Contract, App. 63a-67a; (II) Negligent Misrepresentation, App. 67a-68a; (III) Unilateral Mistake, App. 68a-70a; (IV) Material Breach of Contract, App. 70a-72a; and (V) Work Outside the Scope of the Contract - Quantum Meruit, App. 72a-73a.

The district court (Kollar-Kotelly, J.) dismissed KiSKA's tort claims, Counts I and II, for failure to state a claim on which relief could be granted. App. 23a-29a. As the court explained, in applying the immunity provision of the WMATA Compact, "the D.C. Circuit draws upon the Federal Tort Claims Act's dichotomy between 'discretionary' and 'ministerial' acts." App. 26a. Applying this analysis, the court concluded that the conduct challenged in KiSKA's tort claims—*i.e.*, tortious misrepresentation and/or concealment of material information—was "'susceptible to policy judgment,' and therefore immune from judicial review, because [such conduct] involve[s] planning and design rather than implementation or operation." App. 27a.

The case thus went to trial on KiSKA's contract claims only, and the jury returned a verdict for WMATA. The district court subsequently entered final judgment in WMATA's favor on all counts of the complaint.

The D.C. Circuit affirmed. App. 1a-22a. The court began by explaining that "[b]ecause the distinction between proprietary and governmental functions has created a quagmire that has long plagued the law of municipal corporations, we have interpreted section 80 [of the WMATA Compact] as

incorporating the distinction between discretionary and ministerial functions, a dichotomy set forth in the [FTCA]." App. 10a (internal quotations and citations omitted). That dichotomy, the court stated, required analysis of two issues: (1) "whether any statute, regulation, or policy specifically prescribes a course of action for an employee to follow," and (2) "whether the exercise of discretion is grounded in social, economic, or political goals," App. 10a-11a (internal quotations and citations omitted).

Applying this analysis, the D.C. Circuit first held that "WMATA's discretion to select a particular project design encompass[es] the discretion to determine *the content of that project's bid package*." App. 11a (emphasis added). In other words, because WMATA had "discretion" to design the subway tunnels, it had "discretion" to conceal material information to induce lump-sum bids on which its contractors would necessarily lose money. The covenant of good faith and fair dealing did not limit such "discretion," the court declared, because that is a contract, not a tort, doctrine, and KiSKA failed to identify any statute, regulation, or policy specifically prohibiting WMATA from committing fraud on its contractors. App. 12a-13a.

The D.C. Circuit then held that "WMATA's discretionary decision to exclude certain design documents from the tunnel project's bid package is susceptible to policy judgment." App. 15a (internal quotation and citation omitted). That is so, the court stated, because "WMATA's decision required consideration of budgetary constraints and economic expediency," namely "packaging, duplication and distribution costs" as well as the risk of "releas[ing] unreliable or mistaken reports." *Id.* The complaint, of course, specifically alleged that the concealed information had been accurate, and had been concealed precisely to trick contractors into submitting artificially low lump-sum bids for the job. *See* App. 44a-61a, 63a-68a.

Accordingly, the D.C. Circuit affirmed the district court's dismissal of KiSKA's tort claims on the pleadings under section 80 of the WMATA Compact. App. 16a. The D.C. Circuit then proceeded to affirm the district court's rulings on KiSKA's contract claims as well, and thus to affirm the judgment in WMATA's favor on all grounds. App. 22a. This petition follows.

REASONS FOR GRANTING THE WRIT

I. The D.C. Circuit Erred By Replacing The Governmental/Proprietary Distinction In The WMATA Compact With The Discretionary/Ministerial Distinction In The Federal Tort Claims Act.

The D.C. Circuit erred, first and foremost, by analyzing WMATA's asserted immunity from KiSKA's tort claims under the FTCA's discretionary/ministerial distinction rather than the WMATA Compact's distinct governmental/proprietary distinction. An interstate Compact is not a hortatory declaration; rather, it is a binding contract between sovereign States that is also ratified by Congress under the Constitution's Compact Clause, Art. I, § 10, cl. 3. Courts are therefore not free to rewrite the terms of an interstate Compact just because they think those terms are difficult to apply; rather, "unless the compact to which Congress has consented is somehow unconstitutional," it must be applied by the courts according to its "express terms." *Texas,* 462 U.S. at 564-65. The D.C. Circuit did not even purport to do that here.

The WMATA Compact was negotiated and signed by the District of Columbia, Maryland, and Virginia, to create a regional authority that would, among other things, build and operate a mass transit system. Congress, pursuant to its authority under the Compact Clause, Art. I, § 10, cl. 3 (as well as its constitutional authority over the District of Columbia, *see* Art. I, § 8, cl. 17) ratified the Compact in November 1966. *See* WMATA Compact, Pub. L. No. 89-774, 80 Stat. 1324 (1966).

Thus, although the WMATA Compact is part of the law of the District of Columbia, *see* D.C. Code § 9-1107.01; Maryland, *see* Md. Code Ann., Transp. § 10-204, and Virginia, *see* Va. Code Ann. § 56-529, it is also "a law of the United States," *Cuyler v. Adams*, 449 U.S. 433, 438-40 (1980), and its interpretation presents a federal question, *see id.; see also New Jersey v. New York*, 523 U.S. 767, 811 (1998); *Texas*, 462 U.S. at 564; *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 278 (1959); *West Virginia*, 341 U.S. at 28; *Delaware River Joint Toll Bridge Comm'n v. Colburn*, 310 U.S. 419, 427 (1940); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 566 (1852); Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L. J. 685, 695 (1925) ("Congress ... exercise[s] *national* supervision [over interstate Compacts] through its power to grant or withhold consent, or to grant it under appropriate conditions.") (emphasis added).

Section 80 of the WMATA Compact expressly waives WMATA's sovereign immunity for torts "committed in the conduct of any proprietary function," but not for torts "occurring in the performance of a governmental function." D.C. Code § 9-1107.01(80); Va. Code Ann. § 56-529(80); Md. Code Ann., Transp. § 10-204(80). The Compact did not create this distinction out of whole cloth; rather, the distinction has an ancient pedigree in the common law of municipal liability. *See, e.g.*, 18 Eugene McQuillin, *The Law of Municipal Corporations* §§ 53.02.10, 53.23 (3d ed. 2003). Courts across the country have long applied, and continue to apply, that distinction. *See, e.g., Wojcik v. Massachusetts State Lottery Comm'n*, 300 F.3d 92, 99 (1st Cir. 2002) (noting that in determining whether an entity is an 'arm of the state' entitled to immunity, the court analyzes, among other things, "whether the agency's function is governmental or proprietary"); *City of Gastonia v. Balfour Beatty Constr. Corp.*, 222 F. Supp. 2d 771, 774 (W.D.N.C. 2002) (applying governmental/proprietary distinction and

holding that city's conduct of business relationships with contractors and subcontractors is proprietary); *City of Pontiac v. Consumers Power Co.*, 300 N.W.2d 594, 596 (Mich. Ct. App. 1981) (applying governmental/proprietary distinction and holding that city's construction of public hospital is proprietary); *Wygonski v. Medina Cty. Agric. Soc'y*, 785 N.E.2d 831, 836-37 (Ohio Ct. Com. Pl. 2002) (applying governmental/proprietary distinction and holding that provision of water to county fair concessionaires is a proprietary function); *Harrell v. City of Norfolk*, 578 S.E.2d 756, 757-58 (Va. 2003) (applying governmental/proprietary distinction and holding that city's maintenance of cross-walk is governmental); *see also Owen v. City of Independence*, 445 U.S. 622, 681 (1980) (Powell, J., dissenting) (noting that a number of States retain governmental/proprietary distinction for municipal liability).

Indeed, ironically enough, this Court has expressly *rejected* an attempt to interpret the FTCA's textual discretionary/ministerial distinction by reference to the traditional governmental/proprietary distinction. *See Indian Towing Co. v. United States*, 350 U.S. 61 (1955). As the Court explained, the FTCA (enacted in 1946) "was the product of nearly thirty years of congressional consideration" and "the language of the statute does not support the Government's argument" that the textual discretionary/ministerial distinction was meant to codify the common-law governmental/proprietary distinction. *Id.* at 68. Writing for the Court, Justice Frankfurter minced no words in criticizing the latter distinction, which he described as a "quagmire that has long plagued the law of municipal corporations." *Id.* at 65.

It was thus eminently clear in 1966—when the District of Columbia, Maryland, and Virginia negotiated and signed, and Congress ratified, the WMATA Compact—that the Compact's governmental/proprietary distinction was distinct from the FTCA's discretionary/ministerial distinction. And that point

remained just as clear after 1966. *See, e.g., Owen*, 445 U.S. at 644-50 (distinguishing between governmental/proprietary and discretionary/ministerial tests for municipal liability); *Spencer v. General Hosp.*, 425 F.2d 479, 484 (D.C. Cir. 1969) (*en banc*) (overruling circuit precedent and replacing common-law governmental/proprietary standard for governmental liability in the District of Columbia with the FTCA's discretionary/ministerial standard, and distinguishing between the two standards). It necessarily follows that there is no basis for courts to construe these two textually and historically different distinctions to be one and the same. It is a fundamental tenet of contract law that parties to a contract (like the entities that signed the WMATA Compact) are deemed to have acted by reference to existing legal precepts. *See, e.g., Norfolk & W. Ry. Co. v. Train Dispatchers Ass'n*, 499 U.S. 117, 129-30 (1991); *see generally* 11 Richard A. Lord, *Williston on Contracts* § 30:19 (4th ed. 1999). And it is equally well settled that Congress acts against the background of prior judicial decisions. *See, e.g., Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 758 (1998). If the framers of the WMATA Compact wanted to adopt the discretionary/ministerial distinction to govern WMATA's sovereign immunity, they could and would have done so. *See, e.g., Texas*, 462 U.S. at 565 ("The Pecos River Compact clearly lacks the features of these other compacts, and we are not free to rewrite it."). No one in 1966 could reasonably have thought that the governmental/proprietary distinction expressly set forth in the WMATA Compact was a reference to the discretionary/ministerial distinction expressly set forth in the FTCA.

And for more than twenty years, no court applying Section 80 of the WMATA Compact suggested any such thing. To the contrary, the D.C. Circuit, the Fourth Circuit, and the D.C. Court of Appeals all applied the traditional governmental/proprietary distinction. *See, e.g., Morris v.*

WMATA, 781 F.2d 218, 220 (D.C. Cir. 1986); *Martin v. WMATA*, 667 F.2d 435, 436 (4th Cir. 1981) (*per curiam*); *Hall v. WMATA*, 468 A.2d 970, 972 (D.C. 1983). Indeed, the D.C. Court of Appeals in *Hall* expressly *rejected* an invitation to abandon the WMATA Compact's governmental/proprietary distinction in favor of the FTCA's discretionary/ministerial distinction. *See id.* As the court explained, "Section 80 is clear in that it establishes the 'governmental-proprietary' analysis to determine if tort immunity is applicable," and "ours is not the province to rewrite a provision that is, at once, a statute and a contract among sovereigns." *Id.*

All that changed, however, in 1987, when the D.C. Circuit announced in *Sanders* that "[i]n granting immunity from tort actions to WMATA's 'governmental' functions, the Compact seems to us to have accepted" the FTCA's discretionary/ministerial distinction. 819 F.2d at 1155. "The parallel is apparent," the court declared, because both the FTCA and the WMATA Compact sought to limit the waiver of governmental immunity for certain torts. *Id.* In a footnote, the court "recognize[d]" that the "Federal Tort Claims Act test and the 'governmental-proprietary' test are viewed as distinct and not necessarily coterminous," but asserted that "the 'discretionary function' standard is *at least a subset* of 'governmental functions.'" *Id.* at 1155 n.9 (emphasis added).

That critical assertion is manifestly incorrect. While *some* discretionary activities may be governmental in nature, it is simply not true that *all* discretionary activities are governmental in nature. To the contrary, a whole host of discretionary activities are proprietary in nature, since private parties no less than the government exercise discretion. *See, e.g., United Artists Theatre Co. v. Walton*, 315 F.3d 217, 233 (3d Cir. 2003) (noting that in the corporate law context, the business judgment rule cautions courts from interfering with the discretion of corporate directors and that the corporate director's job consists in part of "decision-making—*i.e.*, the making of economic

choices and the weighing of the potential of risk against the potential of reward"); *Great Rivers Co-op. of Southeastern Iowa v. Farmland Indus., Inc.*, 198 F.3d 685, 702 (8th Cir. 1999) (noting that the "'business judgment rule' shields a director from liability in the case of good faith decisions *within the director's discretion*") (emphasis added). Indeed, the very authority cited by the D.C. Circuit in *Sanders* for the proposition that discretionary activities are "at least a subset" of governmental activities says no such thing. *See* 819 F.2d at 1155 n.9 ("discretionary function" test "is based on the theory that *some* governmental functions are of a type that should not be subject to review and second-guessing by the courts in a tort decision.") (quoting *Restatement (Second) of Torts* § 895C cmt. g (1979)) (emphasis added). Not all discretionary decisions are governmental, and not all governmental decisions are discretionary. Thus, as a matter of law and logic, there is no basis for applying the FTCA's discretionary/ministerial distinction as a proxy for the WMATA Compact's governmental/proprietary distinction.

The D.C. Circuit has since sought to justify its importation of the FTCA's discretionary/ministerial distinction into the WMATA Compact by asserting that the governmental/proprietary distinction is "difficult" to apply "with any precision beyond obviously public activities like law enforcement." *Beebe v. WMATA*, 129 F.3d 1283, 1287 (D.C. Cir. 1997); *see also Dant v. District of Columbia*, 829 F.2d 69, 74 (D.C. Cir. 1987) (applying governmental/proprietary distinction would be "a task so difficult, given the state of our society, that it would sometimes invite arbitrary judicial decision"); *Beatty v. WMATA*, 860 F.2d 1117, 1127 (D.C. Cir. 1988) (same); *Souders v. WMATA*, 48 F.3d 546, 548-49 (D.C. Cir. 1995) (same); App. 10a (same).

But courts are "not free to rewrite" an interstate Compact because of its perceived shortcomings. *Texas*, 462 U.S. at 564. Indeed, in *New Jersey*, this Court rejected a Special Master's

recommendation to depart from the express terms of an interstate Compact to prevent the boundary between New Jersey and New York from dividing not only Ellis Island "but some of the buildings on it." 523 U.S. at 811. Although the Court "appreciate[d] the difficulties" of applying this boundary line, the Court emphasized that it had no choice but to respect the "express terms" of the Compact, "no matter what the equities of the circumstances might otherwise invite." *Id.*; *see also Texas*, 462 U.S. at 567-68 ("If there is a compact, ... our first and last order of business is interpreting the compact."); *International Union of Operating Eng'rs v. Delaware River Joint Toll Bridge Comm'n*, 311 F.3d 273, 276 (3d Cir. 2002) (citing *Texas* and *New Jersey* for the proposition that courts cannot "rewrite" an interstate Compact's "express terms" even "for reasons of practicality and convenience"). Because the D.C. Circuit has never suggested (and could not reasonably conclude) that the ancient common-law governmental/proprietary distinction adopted by the WMATA Compact is "somehow unconstitutional," *Texas*, 462 U.S. at 564, it has no choice but to apply that distinction in assessing WMATA's claims of sovereign immunity.

In any event, there is irony in the D.C. Circuit's embrace of the FTCA's discretionary/ministerial distinction on judicial administrability grounds, because that distinction itself has proven notably "difficult[]" for the courts to apply. *United States v. Gaubert*, 499 U.S. 315, 335 (1991) (Scalia, J., concurring in the judgment). This very case proves the point. The D.C. Circuit held that withholding material information to induce a contractor to submit an artificially low lump-sum bid for a construction project was a "discretionary" act grounded in "policy" considerations. App. 11a-16a. Whatever the merits of that holding (and, as noted in Section II below, petitioners believe it is manifestly incorrect), even the D.C. Circuit conceded that it "present[ed] a closer question than those decided in cases past." App. 15a.

Applying the WMATA Compact's governmental/proprietary distinction, however, this is not even a close call. The function of *entering into* a construction contract is proprietary, even if the government will ultimately use the project to perform a governmental function. *See, e.g., Green Island Contracting Corp. v. New York*, 458 N.Y.S. 2d 828, 833 (N.Y. Ct. Cl. 1983) (noting that the State acted in a proprietary capacity when entering into and terminating contracts for the construction of a state highway); *Ruth v. Blue River Constructors*, 224 F. Supp. 717, 718 (D. Colo. 1963) ("Denver, acting in its proprietary capacity, through its Board of Water Commissioners, had authority to enter into the contract for the construction of the water diversion tunnel known as the Roberts Tunnel."), *cf. Portmann v. United States*, 674 F.2d 1155, 1160-61 (7th Cir. 1982) (noting that "[t]he sovereign/proprietary distinction has proven to be particularly useful in cases involving governmental contracts" and that "essentially commercial transactions involving the purchase or sale of goods *or services*" are proprietary) (emphasis added).

While the WMATA Compact may shield WMATA from liability for tort claims based generally on its design of subway tunnels, the Compact—when properly read—does not shield WMATA from liability for tort claims based on fraud committed in the course of contracting for tunnel construction services. "How [a governmental entity] conducts its business relationships with contractors and subcontractors is not inherently governmental—such a function requires no exercise of governmental discretion. It is a function that could just as easily be exercised (and, in fact, is routinely exercised) by private corporations and individuals." *Gastonia*, 222 F. Supp. 2d at 774 (holding that even though general decisions regarding design and location of a water treatment plant are governmental functions, city's conduct of business relationships with contractors and subcontractors during plant construction was proprietary). The D.C. Circuit's concern over the difficulty

of applying the WMATA Compact's governmental/proprietary distinction, thus, is not only illegitimate but illusory.

Finally, as a practical matter, no further percolation can reasonably be expected on this issue, because the Fourth Circuit (the only other federal circuit likely to hear claims against WMATA) recently "agree[d] with the Court of Appeals for the District of Columbia Circuit" that immunity from tort claims under section 80 of the WMATA Compact must be analyzed "on the basis of the FTCA's legal principles." *Smith v. WMATA*, 290 F.3d 201, 207 (4th Cir. 2002). According to the Fourth Circuit, "a proper consideration in construing the Compact is the maintenance of consistency between the legal interpretations of the two federal circuits most likely to hear cases in which [WMATA] is a party, *i.e.*, this Court and the Court of Appeals for the District of Columbia [*sic*]." *Id.* at 207 n.9 (internal quotation omitted).

Judge Michael vigorously dissented on the ground that "the D.C. Circuit's approach to the governmental function exception [to the waiver of sovereign immunity under the WMATA Compact] is inconsistent with the intent of the Compact's framers and ... any pragmatic considerations supporting that circuit's approach are not strong enough to justify it." *Id.* at 219. "To begin with the most obvious point, surely the Compact's framers would have used the terms 'discretionary' and 'ministerial' in section 80 if they had meant to signal their allegiance" to the FTCA. *Id.* In light of *Indian Towing,* it is implausible to think that the WMATA signatories and Congress meant to adopt the discretionary/ministerial distinction by adopting the governmental/proprietary distinction. *See id.* "It makes far more sense to believe that section 80 was drafted as a compromise between the differing rules of governmental immunity then followed by the Compact's signatories." *Id.* at 220.

Judge Michael recognized that, "because our sister circuit's approach to section 80 appears well-established, the cost of

refusing to follow that approach is to create a circuit split between the only two circuits that are likely to hear tort claims against [WMATA]." *Id.* at 222. Nonetheless, he concluded, "adopting what I regard as a better reading of the [WMATA] Compact is worth the price of creating a circuit split." *Id.* "While I appreciate the practical considerations behind the majority's decision to follow the D.C. Circuit's reading of section 80, the price of intercircuit consistency on this issue is the gutting of the Compact's waiver of sovereign immunity. I believe that price is too high." *Id.*[3]

KiSKA should not be forced to pay that high price here, by being denied its day in court on tort claims under an immunity analysis with no basis in the WMATA Compact. Because the interpretation of an interstate Compact is the solemn "function and duty of the Supreme Court of the Nation," *West Virginia,* 341 U.S. at 28, this Court should not allow the D.C. Circuit's erroneous interpretation of the WMATA Compact to become the definitive law of the land by default.

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[3] Because Section 81 of the WMATA Compact vests original (but not exclusive) jurisdiction over actions by or against WMATA in "[t]he United States District Courts," D.C. Code § 9-1107.01(81); Md. Code Ann., Transp. § 10-204(81); Va. Code Ann. § 56-529(81), WMATA always has the option of litigating in federal court. To date, WMATA has not always exercised that option, and some actions have been litigated in state court. It is worth noting, in this regard, that the D.C. Court of Appeals (in a reversal of its *Hall* precedent) now also has followed the D.C. Circuit in substituting the FTCA's discretionary/ministerial distinction for the WMATA Compact's governmental/proprietary distinction. *See McKethean v. WMATA*, 588 A.2d 708, 712-13 (D.C. 1991). The court's decision to follow federal precedent on this point is not surprising, given that "[w]hether an activity is proprietary or governmental is a question of federal law because the WMATA Compact is an Act of Congress." *Id.* at 712. The state courts of Maryland and Virginia do not appear to have addressed this question, but even in the unlikely event that they were to reject the prevailing federal interpretation on this question of federal law, WMATA could always avoid those courts in the future by removing cases presenting sovereign immunity issues (which may explain why the issue has never arisen in those courts in the first place).

II. The D.C. Circuit Erred By Holding That WMATA Has The "Discretion" To Commit Fraud By Concealing Material Information From Its Contractors, And That The Exercise Of Such "Discretion" Is "Grounded In Social, Economic, Or Political Policy."

Wholly apart from the D.C. Circuit's erroneous decision to apply the FTCA's discretionary/ministerial standard to the WMATA Compact in the first place, the court erred in applying that standard by holding that WMATA has the "discretion" to commit fraud by withholding material information from its contractors, and that the exercise of such "discretion" is "grounded in social, economic, or political policy." App. 11a-16a (internal quotation omitted). That holding is antithetical not only to the WMATA Compact, but to the rule of law.

KiSKA's complaint squarely alleges that WMATA engaged in tortious conduct by withholding material information to induce KiSKA to submit a lump-sum bid that WMATA knew was far below the cost of performance. *See* App. 44a-61a, 63a-68a. The D.C. Circuit framed the issue as whether WMATA has the discretion to determine "the contents of the bid package," App. 11a (capitalization modified), but that is really just a polite way of asking whether WMATA has the discretion to commit fraud, since, "in accordance with the law of the applicable signatory," WMATA Compact § 80, D.C. Code § 9-1107.01(80); Va. Code Ann. § 56-529(80); Md. Code Ann., Transp. § 10-204(80), it is undoubtedly fraudulent to withhold material information to induce someone to enter into a contract, *see, e.g., Hercules & Co. v. Shama Rest. Corp.*, 613 A.2d 916, 923 (D.C. 1992).

The D.C. Circuit held that WMATA does have such "discretion," on the ground that "*KiSKA* has failed to cite any statute, regulation or policy that 'specifically proscribes' the content of WMATA's [bid packages]." App. 12a (emphasis added). As an initial matter, the court thereby saddled the wrong party with the burden of proof on this point, since it was

WMATA's burden (as the party seeking dismissal for failure to state a claim upon which relief can be granted) to show "beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Indeed, even at the *merits* stage, a governmental entity seeking immunity bears the burden of establishing that its challenged conduct was discretionary; the challenging party does not bear the burden of establishing that such conduct was *not* discretionary. *See, e.g., Prescott v. United States*, 973 F.2d 696, 701-02 (9th Cir. 1992); *Carlyle v. United States*, 674 F.2d 554, 556 (6th Cir. 1982); *Stewart v. United States*, 199 F.2d 520, 522 (7th Cir. 1952). Needless to say, the D.C. Circuit's misallocation of the burden of proof tainted its entire analysis. *See, e.g., Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993) (misallocation of burden of proof impervious to harmless-error review).

Above and beyond this fundamental procedural error, the D.C. Circuit erred by holding that fraud and misrepresentation are within the scope of the "discretion" protected by the FTCA. To the contrary, that statute includes a *separate* exception to the waiver of sovereign immunity for "[a]ny claim arising out of ... misrepresentation, deceit, or interference with contract rights," 28 U.S.C. § 2680(h), distinct from the "discretionary function" exception, *id.* § 2680(a). If such tortious misconduct were within the scope of the government's "discretion," of course, that separate exception would be rendered superfluous, in violation of the axiom that courts must construe statutes so that no provisions are rendered inoperative. *See, e.g., United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992). The WMATA Compact tellingly contains no similar intentional-tort exception to the waiver of sovereign immunity, and the D.C. Circuit erred by effectively adding such an exception by simply including intentional torts among WMATA's "discretionary" functions (and thus within the "discretionary function" exception that the D.C. Circuit had already added to the WMATA Compact). The

D.C. Circuit's only justification for its curious characterization of intentional torts as "discretionary" conduct was that "we have previously upheld the dismissal of fraud and misrepresentation claims against WMATA where the challenged activities involved discretionary decisions." 12a n.11 (citing *Beebe,* 129 F.3d at 1286, 1288, a decision that did not address the FTCA's separate exception for intentional torts).

Indeed, contrary to the counterintuitive holding below, it is well-settled that governmental entities do *not* have the discretion to withhold material information from their contract bidders. Rather, "[w]hen the government agency is in possession of information pertinent to construction work to be performed under a contract, there is a *duty* to fully disclose and furnish to the contractor the facts of which the agency has knowledge." *D. Federico Co. v. New Bedford Redevelopment Auth.*, 723 F.2d 122, 125 (1st Cir. 1983) (emphasis added); *see also Hardeman-Monier-Hutcherson v. United States*, 458 F.2d 1364, 1371-72 (Ct. Cl. 1972) (same); *Wm. A. Smith Contracting Co. v. United States*, 412 F.2d 1325, 1338 (Ct. Cl. 1969) (same); *J.A. Jones Constr. Co. v. United States*, 390 F.2d 886, 888 (Ct. Cl. 1968) (same).

The D.C. Circuit attempted to sidestep these cases by asserting that they involved a *contract* disclosure duty rather than a *tort* disclosure duty. *See* App. 12a-13a. That is, however, a distinction without a difference: the point remains that WMATA cannot claim that a decision to withhold material information from its bidders represents the kind of discretionary decision that should be insulated from "judicial 'second-guessing.'" *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984).[4] To the contrary, the integrity of the bidding process

[4] The fact that claims alleging violations of a disclosure duty by the Federal Government must be redressed through contract, rather than tort, simply reflects the fact, noted above, that the FTCA includes a specific provision preserving sovereign immunity for intentional torts like fraud and

would be wholly undermined if the government were free to conceal and/or misrepresent material information about a project to induce artificially low bids. WMATA's discretion to choose a particular *design* for a project simply does not encompass the discretion to conceal and/or misrepresent material *information* about that project.

KiSKA also noted below that WMATA's decision to withhold material information from bidders on the 14th Street tunneling project violated a Federal Transit Administration ("FTA") Circular specifying that WMATA's contract solicitations must "[i]ncorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured." FTA Circular 4220.1D ("Third Party Contracting Requirements") ¶ 8(c)(1); D.C. Cir. App. 1063. The D.C. Circuit held that this Circular was too general to "constrain WMATA's discretion with respect to the particular documents to include within a bid package." App. 13a. But it is fanciful to think that only a regulation specifically prohibiting WMATA from committing fraud by withholding material information from its contractors would suffice to constrain its discretion in this regard; presumably, no regulation specifically prohibits WMATA from ordering murders, but that hardly brings murder within the agency's "discretion." Again, this is not supposed to be a game for clever lawyers, but a common-sense inquiry into the kind of official conduct that

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misrepresentation. *See* 28 U.S.C. § 2680(h). Cases from States that have waived sovereign immunity for intentional torts like those enumerated in Section 2680(h) specifically recognize a *tort* duty not to conceal and/or misrepresent material information. *See, e.g., City of Columbia v. Paul N. Howard Co.*, 707 F.2d 338, 340-41 (8th Cir. 1983) (*per curiam*) (applying Missouri law); *P.T.&L. Constr. Co. v. New Jersey*, 531 A.2d 1330, 1339-41 (N.J. 1987); *Earl L. Reamer Co. v. City of Swartz Creek*, 256 N.W.2d 447, 450 (Mich. Ct. App. 1977) (*per curiam*); Gregory G. Sarno, Annotation, *Public Contracts: Duty of Public Authority to Disclose to Contractor Information, Allegedly in its Possession, Affecting Cost or Feasibility of Project*, 86 A.L.R.3d 182, 189-97, 206-13 (1978); *cf. Restatement (Second) of Torts* §§ 550-51 (1977).

should be insulated from "judicial 'second-guessing.'" *Varig Airlines*, 467 U.S. at 814.

In any event, even if there were some basis for concluding that WMATA has the "discretion" to withhold material information from its contractors, it is simply beyond the pale to suggest that the exercise of any such "discretion" is "grounded in social, economic, or political policy." App. 14a (internal quotation omitted); *cf. Varig Airlines,* 467 U.S. at 814 (discretionary function exception protects only choices "grounded in social, economic, [or] political policy"); *Gaubert*, 499 U.S. at 325 n.7 ("There are obviously discretionary acts performed by a Government agent that are within the scope of his employment but not within the discretionary function exception because these acts cannot be said to be based on the purposes that the regulatory regime seeks to accomplish."). Whatever else it may be, a decision to withhold information to induce a contractor to submit an artificially low bid on a construction project cannot possibly be deemed a "policy" choice "of the nature and quality that Congress intended to shield from tort liability." *Varig Airlines*, 467 U.S. at 813.

The D.C. Circuit's efforts to avoid this straightforward point do not pass the straight-face test. Again characterizing the challenged conduct as the "decision to exclude certain design documents from the tunnel project's bid package," App. 15a, the court held that this decision "required consideration of budgetary constraints and economic expediency"—specifically, the cost of "packaging, duplication and distribution" and the risk of releasing "unreliable or mistaken reports," *id.* But WMATA *included* in the bid package extensive but obsolete reports from the 1960s and 70s while withholding the more recent and accurate GZA reports. And in any event, the fact that WMATA may have committed fraud to save money does not render such misconduct a legitimate policy choice. *See* Ralph C. Nash & John Cibinic, *Federal Tort Claims Act: License to Commit Fraud*, 17 No. 5 Nash & Cibinic Rep. P. 26

(May 2003) (noting, in light of the decision below, that "[t]he courts evidently believe that it is proper to hide things from prospective contractors if disclosing the information might increase prices," and stating that this "type of money grubbing is not what we should expect from our Government" and "[i]n addition, ... is just stupid."). If the farfetched "policy" considerations articulated by the D.C. Circuit were deemed sufficient to satisfy the discretionary function exception, then that exception would "all but swallow up" the rule, *ARA Leisure Servs. v. United States*, 831 F.2d 193, 196 (9th Cir. 1987), and would defeat the point of waiving sovereign immunity in the first place.

The D.C. Circuit's suggestion that WMATA might have a legitimate policy rationale for withholding "unreliable or mistaken reports," App. 15a, simply assumes the *merits* of the issue, *i.e.*, that the information concealed from KiSKA and the other bidders was not material. KiSKA's complaint, however, specifically challenges WMATA's decision to withhold *material* information in its possession relating to the difficulty of performing the 14th Street tunneling project, and that information that turned out to be entirely accurate. App. 44a-61a, 63a-68a. The D.C. Circuit recognized that its decision gave WMATA *carte blanche* to withhold material information from bidders, but asserted that WMATA could be trusted to police itself in this regard, because if the agency withheld "all unfavorable information from contractors; ... [it] might soon find few firms willing to submit bids on its projects." App. 15a. Nothing in the WMATA Compact, however, remotely supports this Hobbesian view of the bidding process. Because neither the Compact nor any policy rationale remotely justifies the withholding of material information from bidders, the D.C. Circuit erred by affirming the dismissal of KiSKA's tort claims for failure to state a claim on which relief can be granted.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari*.

Respectfully submitted,

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July 9, 2003

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued Oct. 22, 2002 Decided March 11, 2003

No. 01-7156

KISKA CONSTRUCTION CORPORATION, U.S.A., AND KAJIMA ENGINEERING AND CONSTRUCTION, INCORPORATED, A PARTNER IN KISKA-KAJIMA, A JOINT VENTURE, APPELLANTS,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, APPELLEE.

Appeal from the United States District Court
for the District of Columbia
(No. 97cv02677)

Kenneth W. Starr argued the cause for the appellants. *Christopher Landau* and *Grant M. Dixton* were on brief.

Kenneth B. Weckstein argued the cause for the appellee. *Phillip T. Staub* was on brief.

Before: GINSBURG, *Chief Judge*, HENDERSON, *Circuit Judge*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the court filed by *Circuit Judge* HENDERSON.

KAREN LECRAFT HENDERSON, *Circuit Judge:* Appellee Washington Metropolitan Area Transit Authority ("WMATA")

contracted with Appellants KiSKA Construction Corporation-U.S.A. and Kajima Engineering and Construction, Inc. (collectively "KiSKA") in early 1994 to construct two subway tunnels in Washington, D.C. for a fixed price of $43 million. After experiencing various difficulties completing the project, KiSKA filed suit against WMATA in the United States District Court for the District of Columbia alleging counts of: (1) fraudulent misrepresentation; (2) negligent misrepresentation; (3) unilateral mistake; (4) material breach of contract; and (5) quantum meruit.

The district court dismissed KiSKA's two tort claims—fraudulent misrepresentation and negligent misrepresentation—for lack of subject matter jurisdiction, concluding that WMATA had not waived its sovereign immunity from liability for torts occurring in the performance of a governmental function. The district court then granted summary judgment to WMATA on KiSKA's quantum meruit claim. After a five-week trial on the remaining contract claims, the jury returned a verdict for WMATA on both counts. The district court subsequently entered final judgment in WMATA's favor on March 23, 2001 and denied KiSKA's motion for a new trial on August 20, 2001.

On appeal, KiSKA challenges three pre-trial rulings that the district court's August 20, 2001 opinion and order incorporated by reference. First, KiSKA argues that the district court erred in dismissing its tort claims on sovereign immunity grounds. Second, KiSKA argues that the district court misinterpreted the contract's dewatering provisions. Third, KiSKA argues that the district court likewise misinterpreted the contract's grout hole provisions. We find all three of KiSKA's challenges to be without merit and, accordingly, affirm the judgment of the district court.

I. Background

A. The 14th Street Tunnel Project

This litigation arises out of the extension of WMATA's Green Line subway train under 14th Street in Washington, D.C. Before soliciting bids for the tunnel project, WMATA retained an outside technical expert, GZA GeoEnvironmental, Inc. ("GZA"), to analyze the subsurface conditions in the project area and to study the feasibility of various tunneling methods, tunneling equipment and dewatering systems.[1] GZA submitted its first Tunnel Alternative Report ("TAR") in November 1992. The first TAR reported that "[g]roundwater for most of the [tunnel] alignment is anticipated to be above the crown [*i.e.*, the top of the tunnel]," and that, in light of this soil condition, "even . . . fairly extensive dewatering" was not likely to be entirely "[e]ffective." Joint Appendix (JA) 30-31. Accordingly, GZA recommended not only that "some type of closed face tunnel boring machine" be used for the project, but also that "open face tunneling be strictly prohibited on this contract."[2] JA 31.

GZA submitted a revised TAR in January 1993. The second TAR reaffirmed the conclusions of the first, noting that "dewatering considerations dictate closed face mining methods," JA 32, and that "[o]pen faced tunneling in conjunction with dewatering is not judged a viable construction technique on this [c]ontract," JA 33. After reviewing the second TAR, WMATA's Board of Engineers met with GZA.

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[1] Dewatering systems use a combination of dewatering wells and control piezometers to reduce hydrostatic pressure and to control and remove both groundwater and surface water from the tunnel excavation during construction.

[2] An open face tunnel boring machine is "essentially a cylinder with a digging mechanism in the center of it, much like a backhoe that you might see on the streets of the city." JA 495. A closed face machine is also "a cylinder, but as its name describe[s], the face is closed." JA 495.

Shortly thereafter, in March 1993, GZA issued a third and final TAR, which authorized the use of an open face machine, but cautioned that "[e]xtensive dewatering will be an essential element of the open faced shield option." JA 34. Noting that "effective dewatering of the alignment is at best going to be difficult," the third TAR recommended that "an extensive pre-support grouting/ground improvement program . . . be required for most of the alignment."[3] JA 35.

Following the issuance of the third TAR, GZA calculated the extent of the dewatering and grouting necessary to allow for open face tunneling. Even extensive pre-support grouting would not permit open face tunneling, GZA warned WMATA, "if groundwater is not depressed [through dewatering] the recommended two feet below tunnel invert [*i.e.*, the bottom of the tunnel]." JA 35. WMATA then directed GZA to design an appropriate dewatering system for the project. GZA produced a dewatering design that included over three hundred dewatering wells. JA 1045-46.

On December 6, 1993, WMATA issued an Invitation for Bids ("IFB") on the 14th Street tunnel project. The IFB set forth detailed design specifications and required bidders to submit lump-sum bids for carrying out the work based upon those specifications.[4] WMATA did not include GZA's TARs in the bid package, however, nor did WMATA conform the design specifications to GZA's recommended dewatering system. In particular, WMATA's design specifications called for only 61 dewatering wells. JA 40. Based upon the specifications provided by WMATA, KiSKA submitted a lump-

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[3] "Pre-support grouting involves drilling holes into the ground in a regular pattern, and then filling them with a fluid mixture of cement, water, and chemicals, which spreads out into the soil and hardens to form a stable, continuous canopy over the tunnel." Br. for Appellant at 8.

[4] A design specification describes in precise detail the materials to be employed and the manner in which the construction work is to be performed. *P.R. Burke Corp. v. United States*, 277 F.3d 1346, 1357 (Fed. Cir. 2002).

sum bid of approximately $43 million. WMATA accepted KiSKA's bid and, in early 1994, the two parties signed a construction contract.

B. The Dewatering and Grout Hole Provisions

Section 205 of the contract governed dewatering. It not only set forth a detailed dewatering system for the project, but also required KiSKA to implement the system specified therein: "The Contractor shall proceed with the installation of the specified dewatering system as soon as possible after notice to proceed." Contract § 205, ¶ 1.1(A). Two subsections touched on the question whether the contract required the dewatering system to maintain the groundwater level at two feet below tunnel invert. Section 205(1.2)(B)(3) read, in pertinent part, as follows:

> For mined earth tunnels, additional wells beyond the specified minimum dewatering system may be required to effectively reduce hydrostatic pressure and control groundwater in soil surrounding each tunnel in order to prevent the following:
>
> a. Heaving of the invert, blowups, hazardous seepage and sudden flow of soil in tunnel face.
>
> b. Loss of ground and surface subsidence.
>
> c. Maintain groundwater 2 feet below invert.

Id. § 205, ¶ 1.2(B)(3). Section 205(1.1)(A) also addressed dewatering, stating that "[t]he designed dewatering system may not eliminate all groundwater from the tunnel excavation. The Contractor shall be prepared to support the tunnel face . . . and to handle and convey groundwater from the tunnel to appropriate discharge locations." *Id.* § 205, ¶ 1.1(A). This subsection further provided that "[a]dditional dewatering wells may be required based on the observed performance of the dewatering system." *Id.*

Section 239 of the contract covered pre-support chemical grouting, specifying the precise location of thousands of surface pre-support grout holes to stabilize the soil around the tunnels. In particular, Section 239(1.1)(B) provided that "[p]re-support chemical grouting shall be preformed [sic] from the existing ground surface at locations shown on the contract drawings." *Id.* § 239, ¶ 1.1(B). Although these drawings depicted grout holes drilled vertically at five-foot intervals in a diamond grid pattern, *see* JA 1001, Section 239(3.2)(A) stated that grout piping should be installed "horizontally, vertically or inclined, as required," Contract § 239, ¶ 3.2(A). "In [the] case of [a] discrepancy between Drawings and Specifications," the contract's General Provisions provided that "the Specifications shall govern." JA 755.

C. The Pre-Trial Rulings

During the tunnel's construction, KiSKA experienced a number of difficulties with both the dewatering system and the excavation methods required by the contract. Two complications proved particularly troublesome: (1) the dewatering system specified by WMATA failed to lower the groundwater table two feet below the tunnel invert and (2) the great majority of surface grout holes could not be drilled vertically at their specified locations without damaging underground utility lines. Although KiSKA overcame these difficulties and eventually completed the project, it did so at a cost of almost double its $43 million lump-sum bid. Upon completion of the project, KiSKA filed a five-count complaint against WMATA asserting both tort and contract claims.

Before the case went to trial, the district court issued several pre-trial rulings, three of which KiSKA now challenges on appeal. First, the district court dismissed KiSKA's tort claims on sovereign immunity grounds, holding that "the challenged decisions are 'susceptible to policy judgment,' and therefore immune from judicial review, because they involve planning and design rather than implementation or operation." *KiSKA*

Constr. Corp. v. WMATA, Civ. No. 97-2677 at 5 (D.D.C. Feb. 7, 2000) (mem.) (First Order). Second, the district court held that the contract was "ambiguous, but not patently so," with respect to whether the contract required that the dewatering system maintain the groundwater level at two feet below tunnel invert. *KiSKA Constr. Corp. v. WMATA*, Civ. No. 97-2677 at 7 (D.D.C. June 9, 2000) (mem.) (Second Order).[5] Third, the district court held that while "the contract affords no flexibility with regard to the locations of grout drillings," *KiSKA Constr. Corp. v. WMATA*, Civ. No. 97-2677 at 8 (D.D.C. Dec. 22, 2000) (mem.) (Third Order) (emphasis in original), the contract permitted KiSKA "to drill all grout holes, including surface grout holes, 'horizontally, vertically or inclined,'" *id.* at 9 (quoting Contract § 239, ¶ 3.2(A)).[6]

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[5] The district court reached this conclusion in the course of rejecting WMATA's motion for partial summary judgment, which had asked the district court to "rule as a matter of law that the contract did not require that the dewatering system lower the groundwater to two feet below the bottom of the tunnel." Second Order at 1.

[6] The district court addressed whether the contract mandated the vertical drilling of grout holes in the course of rejecting WMATA's argument that the contract's "utilities clause" rendered WMATA immune from liability. Third Order at 1-9. The utilities clause provided, in pertinent part, as follows:

> a. . . . The Contract Drawings show some known public and private utilities in their approximate locations within the limits of the project which are expected to interfere with the work. The Contractor is, however, cautioned that these locations are not guaranteed, nor is there any guarantee that utilities lines in existence within the limits of the project have been shown . . . .
>
> b. . . . Before commencing construction, the Contractor shall verify the locations of utilities which may be affected by his operations . . . .

Contract § 101, ¶ III(D)(18).

II. Analysis

We review *de novo* the dismissal of KiSKA's tort claims for lack of subject matter jurisdiction, accepting as true all of the factual allegations contained in the complaint.[7] *Sturm, Ruger & Co. v. Chao*, 300 F.3d 867, 871 (D.C. Cir. 2002). We review the district court's construction of the contract between KiSKA and WMATA under the same *de novo* standard. *LTV Corp. v. Gulf States Steel, Inc.*, 969 F.2d 1050, 1055 (D.C. Cir.), *cert. denied*, 506 U.S. 1022 (1992) ("Interpretation of the plain

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[7] Relying on *Herbert v. Nat'l Acad. of Sciences*, 974 F.2d 192, 197-98 (D.C. Cir. 1992), WMATA argues that we should consider facts outside of the pleadings in reviewing the district court's dismissal of KiSKA's tort claims. We disagree. Under settled law, the district court may dispose of a motion to dismiss for lack of subject matter jurisdiction "on the complaint standing alone." *Id.* at 197. Nevertheless, where necessary, the district court may also consider undisputed facts evidenced in the record or disputed facts resolved by the district court. *Id.* As we explained in *Herbert*, however, "[t]he posture in which the motion is presented to [the] trial court has a profound effect on the manner in which this Court will review its disposition." *Id.*

The district court's February 7, 2000 Memorandum Opinion dismissing KiSKA's tort claims indicates—in a footnote—that "[a] more thorough summary of the facts of this case can be found in the Court's Memorandum Opinion of June 19, 1998." First Order at 2 n.2. This earlier opinion, which denied WMATA's first motion to dismiss, "deduced" certain jurisdictional facts "as presented in the [c]omplaint and the contract." *KiSKA Constr. Corp. v. WMATA*, Civ. No. 97-2677 at 2 (D.D.C. June 19, 1998) (mem.). WMATA relies upon the district court's "incorporation" of the previously "deduced" facts in support of its position that the district court looked beyond the four corners of the complaint in dismissing KiSKA's tort claims on sovereign immunity grounds. WMATA is mistaken. A review of the district court's February 7, 2000 Memorandum Opinion reveals that the district court made no determination of disputed jurisdictional facts in holding that KiSKA's tort claims involved discretionary decisions evincing policy judgment and, as a result, that the claims were barred by sovereign immunity. First Order at 3-7. Given that the district court accepted as true the factual allegations of the complaint, *see id.* at 1-7, "the only matter[ ] before us on appeal [is] whether the [d]istrict [c]ourt's application of the law is correct," *Herbert*, 974 F.2d at 197.

language of a contract is a question of law subject to *de novo* review by this court.").

A. Sovereign Immunity

On appeal, KiSKA argues that the district court erred by dismissing its two tort claims—fraudulent misrepresentation and negligent misrepresentation—on sovereign immunity grounds. Rejecting the district court's conclusion that WMATA had "broad discretion in defining the contours of the invitation for bids," First Order at 6, KiSKA asserts that WMATA lacks the "'discretion' to conceal and/or misrepresent material information" from contractors and that "such tortious conduct does not involve the exercise of a 'policy judgment,'" Br. for Appellant at 20. Thus, KiSKA maintains, sovereign immunity does not shield WMATA from KiSKA's tort claims.

1. Discretionary Functions vs. Ministerial Functions

WMATA is the product of an interstate compact entered into by Maryland, Virginia and the District of Columbia. *Watters v. WMATA,* 295 F.3d 36, 39 (D.C. Cir. 2002). We have frequently recognized that, "'[a]s a quasi-governmental entity created by its signatory parties, WMATA is entitled to share the sovereign immunity of those parties with respect to common law tort actions.'" *Beatty v. WMATA,* 860 F.2d 1117, 1126 (D.C. Cir. 1988) (quoting *Heffez v. WMATA,* 569 F. Supp. 1551, 1552 (D.D.C. 1983)). We have also acknowledged, however, that section 80 of the WMATA Compact provides a limited waiver of WMATA's sovereign immunity for torts "'committed in the conduct of any proprietary function,'" but not for torts occurring "'in the performance of a governmental function.'" *Beebe v. WMATA,* 129 F.3d 1283, 1287 (D.C. Cir. 1997) (quoting D.C. Code Ann. § 9-1107.01(80)). Unless the limited waiver of immunity applies, "the district court lacks jurisdiction to enter a judgment against [WMATA]." *Watters,* 295 F.3d at 39-40.

Because "the distinction between proprietary and governmental functions has created a 'quagmire that has long plagued the law of municipal corporations,'" *Beatty*, 860 F.2d at 1126 (quoting *Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955)), we have interpreted section 80 "as incorporating the distinction between discretionary and ministerial functions," a dichotomy set forth in the Federal Tort Claims Act ("FTCA"), *Dant v. District of Columbia*, 829 F.2d 69, 74 (D.C. Cir. 1987). Given that "[o]nly those activities considered 'discretionary' are shielded by sovereign immunity," *Burkhart v. WMATA*, 112 F.3d 1207, 1216 (D.C. Cir. 1997), WMATA's immunity "turns on whether the [challenged] activity is 'discretionary' or 'ministerial,'" *Beebe*, 129 F.3d at 1287.[8]

To determine whether a WMATA activity is discretionary, and thus shielded by sovereign immunity, we apply a two-part test culled from the FTCA's "discretionary function" jurisprudence.[9] *See id.* First, we ask "whether any '"statute, regulation, or policy specifically prescribes a course of action for an employee to follow."'" *Id.* (quoting *Cope v. Scott*, 45 F.3d 445, 448 (D.C. Cir. 1995) (quoting *United States v. Gaubert*, 499 U.S. 315, 322 (1991))). If a course of action is so prescribed, "sovereign immunity does not bar suits based on an

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[8] WMATA's sovereign immunity likewise extends to "quintessential" governmental functions, such as law enforcement. *Beebe*, 129 F.3d at 1287. Indeed, we typically ask whether the challenged activity amounts to a "quintessential" governmental function before asking whether the activity is "discretionary" or "ministerial." *See id.* We need not ask the former question here, however, because "WMATA has not attempted to shoe-horn its activities into this narrow category of conduct." First Order at 4 n.4.

[9] We have described the distinction between "discretionary" and "ministerial" functions as follows: "'Generally speaking, a duty is discretionary if it involves judgment, planning, or policy decisions. It is not discretionary [*i.e.*, ministerial] if it involves enforcement or administration of a mandatory duty at the *operational level*, even if professional expert evaluation is required.'" *Beatty*, 860 F.2d at 1127 (emphasis in original) (quoting *Jackson v. Kelly*, 557 F.2d 735, 737-38 (10th Cir. 1977)).

employee's failure to follow the prescribed course of conduct." *Burkhart*, 112 F.3d at 1217. If the governing statutes or regulations leave room for the exercise of discretion, however, we ask a second question: "whether the exercise of discretion is 'grounded in "social, economic, or political goals."'" *Beebe*, 129 F.3d at 1287 (quoting *Cope*, 45 F.3d at 448 (quoting *Gaubert*, 499 U.S. at 323)). If the exercise of discretion is so grounded, and hence "susceptible to policy judgment," *Cope*, 45 F.3d at 448, the "activity is 'governmental,' thus falling within section 80's retention of sovereign immunity," *Beebe*, 129 F.3d at 1287.

2. The Contents of the Bid Package: A Discretionary Decision?

This case poses the following question: does WMATA's discretion to select a particular project design encompass the discretion to determine the content of that project's bid package?[10] On appeal, KiSKA answers this question in the negative, arguing that (1) WMATA lacks the discretion to "conceal and/or misrepresent material information" from

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[10] Not surprisingly, the parties disagree as to whether KiSKA's tort claims amount to a challenge to WMATA's design decisions. This dispute reflects the fact that we have long held that WMATA's design decisions are discretionary functions shielded by sovereign immunity. *See, e.g., Souders v. WMATA*, 48 F.3d 546 (D.C. Cir. 1995) (WMATA immune from challenge to noise level guidelines); *Dant*, 829 F.2d at 73-75 (WMATA immune from challenge to fare collection system). A careful reading of the complaint reveals, however, that KiSKA's tort claims stem from WMATA's decision not to include GZA's three TARs in the bid package and not WMATA's decision to select a particular project design over another. JA 24-66.

KiSKA's reliance upon *Beatty* is similarly misplaced. Although *Beatty* recognized that WMATA may be held "liable for a broad range of conduct which implements its discretionary decisions," *Beatty*, 860 F.2d at 1127, the case involved the *implementation* of a design decision, *i.e.*, the Red Line's uninstalled iron beams. It thus sheds no light on whether WMATA's selection of a particular bid package is more properly cast as a "design" decision or as an "implementation" decision.

contractors and (2) "such tortious conduct does not involve the exercise of a 'policy judgment.'" Br. for Appellant at 20.[11]

Applying the two-stage analysis outlined above, *see supra* Part II.A.1, we find that KiSKA has failed to cite any statute, regulation or policy that "specifically prescribes" the content of WMATA's IFBs. Unable to identify support for its position within the four corners of the WMATA Compact, KiSKA relies upon two external sources of authority to argue that WMATA failed, in this case, to follow the prescribed course of conduct: (1) contract cases that recognize a government agency's duty to disclose pertinent facts to contractors with whom the agency contracts, Br. for Appellant at 23-24, and (2) a Federal Transit Administration ("FTA") circular providing that all contract solicitations must "'[i]ncorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured,'" *id.* at 24 (quoting JA 1068).

KiSKA maintains that the general obligation to abide by the covenant of good faith and fair dealing "specifically prescribed" the contents of the bid package, requiring WMATA to disclose to KiSKA all "material" information. We disagree. Although the covenant of good faith and fair dealing undoubtedly constrains WMATA's behavior within the context of its contractual relationships, KiSKA's misrepresentation claims sound in tort, not contract. Given that section 80 distinguishes between tort claims and contract claims, affording a limited waiver of sovereign immunity with respect to the former and a

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[11] Noting that the FTCA contains both a "discretionary function" exception and a "misrepresentation" exception to the waiver of sovereign immunity contained therein, whereas the WMATA Compact includes only the former, KiSKA also argues that section 80 does not afford WMATA immunity from tort suits alleging claims of misrepresentation. But, as WMATA correctly observes, we have previously upheld the dismissal of fraud and misrepresentation claims against WMATA where the challenged activities involved discretionary decisions. *See Beebe,* 129 F.3d at 1286, 1288.

complete waiver of sovereign immunity with respect to the latter, D.C.Code Ann. § 9-1107.01(80), we must agree with the district court's conclusion that the covenant of good faith and fair dealing "is not the kind of *specific* dictate that renders WMATA's acts merely ministerial," First Order at 6 (emphasis in original). *Cf. Burkhart,* 112 F.3d at 1217 (holding that employment provisions of WMATA Compact "hardly constrain" WMATA's discretion over whom it will employ and how it will train and supervise employees).

The FTA circular likewise fails to circumscribe WMATA's discretion with respect to the contents of the bid package.[12] A regulation constrains discretion if it "'specifically prescribes a course of action for an employee to follow'" such that "'the employee has no rightful option but to adhere to the directive.'" *Gaubert,* 499 U.S. at 322 (quoting *Berkovitz v. United States,* 486 U.S. 531, 536 (1988)). Although the FTA circular obligates WMATA to "[i]ncorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured," JA 1068, the circular does not "specifically prescribe" a course of action for WMATA to follow in specifying the contents of a bid package. In our view, an administrative ukase that mandates only clarity and accuracy does not constrain WMATA's discretion with respect to the particular documents to include within a bid package. *Cf. Appalachian Power Co. v. EPA,* 208 F.3d 1015, 1023 (D.C. Cir. 2000). Given KiSKA's failure to produce persuasive authority to the contrary, we conclude that WMATA had broad discretion to determine the contents of the tunnel project's bid package.[13]

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[12] Although WMATA claims that KiSKA did not rely upon the FTA circular before the district court, the record indicates otherwise. JA 135. Accordingly, KiSKA has not waived this argument.

[13] As WMATA correctly observes, at least one court has expressly held that government decisions regarding the content of plans and specifications provided to contractors are immune discretionary functions. *See Frank*

Next, KiSKA argues that WMATA cannot satisfy the second step of the sovereign immunity inquiry, *i.e.*, whether the exercise of such discretion is "grounded in social, economic, or political" policy. *Cope,* 45 F.3d at 448 (internal quotations omitted). As we recognized in *Cope,* "[d]etermining whether a decision is 'essentially political, social, or economic' is admittedly difficult, since nearly every government action is, at least to some extent, subject to 'policy analysis.'" *Id.* (quoting *Red Lake Band of Chippewa Indians v. United States,* 800 F.2d 1187, 1195 (D.C. Cir. 1986)). "'Budgetary constraints,'" we observed, "'underlie virtually all economic activity.'" *Id.* at 449 (quoting *ARA Leisure Servs. v. United States,* 831 F.2d 193, 196 (9th Cir. 1987)).

To avoid the exception swallowing the rule, we have held that the "mere association of a decision with regulatory concerns is not enough [to render that decision 'discretionary']; exempt decisions are those 'fraught with ... public policy considerations.'" *Id.* (quoting *Sami v. United States,* 617 F.2d 755, 767 (D.C. Cir. 1979)). We therefore concluded in *Cope* that "[t]he mere presence of choice—even if that choice involves whether money should be spent—does not trigger the [discretionary function] exemption." *Id.*

WMATA argues that its "employees had to, and did, exercise judgment when they decided that the [bid package] would not benefit from [the] inclusion of superseded, discarded design concepts." Br. for Appellee at 31. Citing the court's decision in *Red Lake*, WMATA maintains that its decisions regarding the manner in which its policies are implemented or enforced are "themselves discretionary because such decisions directly affect the feasibility and practicality of the program, and require

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Briscoe Co. v. County of Clark, 643 F. Supp. 93, 97-98 (D. Nev. 1986), *aff'd,* 857 F.2d 606 (9th Cir. 1988) (interpreting discretionary function exemption under Nevada law in accordance with FTCA principles). Unfortunately, the *Frank Briscoe* decision contains little reasoning in support of its decision. *See id.*

the agency to establish priorities for the accomplishment of its policy objectives by balancing the objectives sought to be obtained against such practical considerations as staffing and funding." *Id.* at 31-32 (quoting *Red Lake,* 800 F.2d at 1196 (internal quotations omitted)). WMATA thus reasons that its "decision not to include thousands of pages of draft or superseded design documents in the bid package is a perfect example of such discretion." *Id.* at 32.

While KiSKA's claim presents a closer question than those decided in cases past, we believe that the district court correctly held that WMATA's discretionary decision to exclude certain design documents from the tunnel project's bid package is "susceptible to policy judgment." *Cope,* 45 F.3d at 448. Specifically, WMATA's decision required consideration of budgetary constraints and economic expediency. While at first glance WMATA's fiscal considerations may appear to pale in comparison to those implicated in hiring decisions, *see Beebe,* 129 F.3d at 1287-88; *Burkhart,* 112 F.3d at 1217, those considerations involve more than simply packaging, duplication and distribution costs. If WMATA were to release unreliable or mistaken reports indicating an inflated need for dewatering wells, for example, the reports could cause contractors to similarly inflate their bids. Of course, WMATA may not withhold all unfavorable information from contractors; if it did, WMATA might soon find few firms willing to submit bids on its projects. WMATA must therefore exercise its policy judgment to balance the goal of fair disclosure against the sensible withholding of unreliable information.

Although KiSKA argues that WMATA's position "assumes the *merits* of the issue, *i.e.*, that the information concealed from bidders was not 'material,'" Reply Br. at 9 (emphasis in original), KiSKA's position, in contrast—given that the merits of a claim will rarely be known before a court establishes its jurisdiction over that claim—would permit endless contractor challenges to WMATA's final specifications. While KiSKA

may disagree with WMATA's decisions regarding the materiality of a given set of documents, such judgments are, in our view, WMATA's to make. We therefore conclude that the content of the tunnel project's bid package is a discretionary decision susceptible to policy judgment and, accordingly, affirm the district court's dismissal of KiSKA's tort claims on sovereign immunity grounds.[14]

B. The Contract Provisions

KiSKA's remaining challenges involve the district court's interpretation of two contract provisions: section 205 (dewatering) and section 239 (pre-support grouting). Both challenges rely upon *United States v. Spearin,* 248 U.S. 132 (1918), "[t]he seminal case recognizing a cause of action for breach of contractual warranty of specifications," *Hercules Inc. v. United States,* 516 U.S. 417, 424 (1996), which held that "if [a] contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications," *Spearin,* 248 U.S. at 136 at 61. Relying on *Spearin,* KiSKA argues that WMATA warranted by implication that (1) its dewatering system would lower the groundwater table in the project area two feet below the tunnel invert and (2) the surface pre-support grout holes required under the contract could be drilled vertically at the precise locations specified by WMATA.

1. The Dewatering System

KiSKA maintains that the district court erred as a matter of law in holding that the contract was "ambiguous" as to whether the contract required—and thus warranted—that the dewatering system would lower the groundwater table in the project area

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[14] Given our conclusion that the district court correctly dismissed KiSKA's tort claims on sovereign immunity grounds, we need not consider WMATA's alternative argument that the district court's dismissal of KiSKA's tort claims constituted "harmless error."

two feet below the tunnel invert. Relying chiefly on section 205(1.2)(B)(3), KiSKA argues that the contract specifically and unambiguously warranted that the groundwater table would be lowered two feet below the invert of the tunnel by the dewatering system WMATA designed. In KiSKA's view, none of the provisions relied on by WMATA abrogates the "clear" statement contained in section 205(1.2)(B)(3) and, accordingly, KiSKA claims that its reading of the contract provides the only "reasonable" interpretation of the dewatering provisions contained therein. Its argument fails.

Section 205(1.2)(B)(3) provided that "[f]or mined earth tunnels, additional wells beyond the specified minimum dewatering system may be required to . . . control groundwater in [the] soil surrounding each tunnel in order to . . . *[m]aintain* groundwater 2 feet below invert." Contract § 205, ¶ 1.2(B)(3) (emphasis added). Noting that the groundwater table could not be "maintain[ed]" two feet below the tunnel invert if it was not already at that level, KiSKA asserts that section 205 required, and hence warranted, that WMATA's dewatering system would indeed lower the groundwater table to two feet below tunnel invert. In KiSKA's view, its reading of section 205(1.2)(B)(3) is confirmed by section 228(1.5)(A)(2)(a)((1)), which provided: "The water table *shall* be lowered as specified in the Specification Section 205." *Id.* § 228, ¶ 1.5(A)(2)(a)((1)) (emphasis added).

WMATA, however, reads section 205(1.2)(B)(3) not as an implied warranty but as "a statement that the minimum dewatering system *might not* lower the groundwater to two feet below invert [and that KiSKA] might have to install additional wells to accomplish that goal." Br. for Appellee at 40 (emphasis in original).[15] According to WMATA, section

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[15] WMATA also maintains that KiSKA waived any challenge to the district court's ruling that the dewatering provisions were ambiguous because KiSKA never made its own motion seeking a ruling that the contract was unambiguous. This argument is without merit. Although the district court

205(1.1)(A) likewise put KiSKA on notice that groundwater may remain in the tunnel despite the dewatering system. Contract § 205, ¶ 1.1(A) ("The designed dewatering system may not eliminate all groundwater from the tunnel excavation."). WMATA further asserts that both section 228(1.5)(A)(1) and section 228(3.5)(A) suggest that groundwater could remain above the tunnel invert without violating the contract. *Id.* § 228, ¶ 1.5(A)(1) (providing that KiSKA must "[c]ontrol groundwater along the tunnel alignment and *within the tunnel heading* to prevent" certain specified events from occurring) (emphasis added); *id.* § 228, ¶ 3.5(A) ("If the tunnel invert is *below* groundwater level, [KiSKA must] maintain qualified personnel on duty to monitor conditions that might threaten stability of heading whenever tunnel excavation is suspended or shut down.") (emphasis added).

The law requires contracts to be read as a whole, with meaning given to every provision contained therein. *See Fort Sumter Tours, Inc. v. Babbitt,* 202 F.3d 349, 357 (D.C. Cir. 2000) (citing *United States v. Ins. Co. of N. Am.*, 83 F.3d 1507, 1511 (D.C. Cir. 1996) (noting the "'cardinal principle of contract construction: that a document should be read to give effect to all its provisions'") (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995))). If the contract "is susceptible to more than one reasonable interpretation," however, the court must find that the contract is ambiguous as a matter of law. *Metric Constructors, Inc. v. NASA,* 169 F.3d 747, 751 (Fed. Cir. 1999).

If the court finds the contract to be ambiguous, it must then determine whether that ambiguity is patent or latent. *Id.* An

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ruled on WMATA's motion for summary judgment, *both* KiSKA and WMATA argued that they offered the only reasonable interpretation of the contract's dewatering provisions. Second Order at 5. As KiSKA correctly observes, once the district court held that the contract was "ambiguous" in this regard, KiSKA did not need to file its own motion for summary judgment in order to preserve the issue for appeal.

ambiguity is patent if it is "glaring, substantial, or patently obvious." *Comtrol, Inc. v. United States,* 294 F.3d 1357, 1365 (Fed. Cir. 2002). Patent ambiguities are construed against a government contractor absent an inquiry "about the correct meaning of the terms at issue." *P.R. Burke Corp. v. United States,* 277 F.3d 1346, 1353 (Fed. Cir. 2002). If the ambiguity is "neither glaring nor substantial nor patently obvious," *Grumman Data Sys. Corp. v. Dalton,* 88 F.3d 990, 997 (Fed. Cir. 1996) (internal quotations omitted), however, and therefore latent, the ambiguity is ordinarily construed against the drafting party, *see, e.g., Jowett, Inc. v. United States,* 234 F.3d 1365, 1368 & n.2 (Fed. Cir. 2000).

Applying these principles, the district court concluded that both KiSKA and WMATA proposed reasonable interpretations of the contract's dewatering provisions, holding the contract to be "ambiguous, but not patently so." Second Order at 7. We disagree and find the provisions to be patently—not latently—ambiguous.

Although KiSKA provides a sensible explanation for each of the provisions relied upon by WMATA,[16] we do not accept KiSKA's assertion that section 205(1.2)(B)(3) provided a "clear" statement that WMATA warranted that its design would lower the groundwater table two feet below tunnel invert. The grammatical difficulties of the provision aside, *see infra* note 17, section 205(1.2)(B)(3) cannot, in our opinion, carry the interpretive weight placed upon it by KiSKA. Contract § 205,

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[16] Responding to WMATA's reliance on section 205(1.1)(A), KiSKA argues that "[a] recognition that the system might not eliminate every last isolated pocket of groundwater from the project area . . . is in no way inconsistent with a warranty that the design would lower the overall groundwater *table* for the project area two feet below the invert." Br. for Appellant at 33 (emphasis in original). Similarly, discussing WMATA's reliance on section 228(3.5)(A), KiSKA asserts that the provision "merely anticipated a contingency in the event that the groundwater table were to rise above the invert." *Id.*

¶ 1.2(B)(3). Section 228(1.5)(A)(2)(a)((1)) likewise fails to advance KiSKA's cause as it appears to speak to the manner of dewatering and not to the level at which the groundwater must be maintained. *Id.* § 228, ¶ 1.5(A)(2)(a)((1)).

In our view, the grammatical errors of section 205(1.2)(B)(3) render the ambiguity of the dewatering provisions sufficiently obvious that KiSKA had a duty to inquire as to the true meaning of the contract.[17] *See P.R. Burke Corp.*, 277 F.3d at 1353. By failing to so inquire, KiSKA assumed the risk that the government would offer a reasonable, but conflicting, interpretation, *see Triax Pacific, Inc. v. West,* 130 F.3d 1469, 1474-75 (Fed. Cir. 1997), which interpretation would then be accepted by the court—a risk realized by our rejection of KiSKA's claim, *see Jowett,* 234 F.3d at 1368 & n.2.

2. Pre-Support Grout Holes

Finally, KiSKA argues that the district court erred as a matter of law by holding that, while "the contract affords no flexibility with regard to the *locations* of grout drillings," Third Order at 8 (emphasis in original), the contract "permitted [KiSKA] to drill all grout holes, including surface grout holes, 'horizontally, vertically or inclined,'" *id.* at 9 (quoting Contract § 239, ¶ 3.2(A)). Specifically, KiSKA maintains that the contract specified that "all such grout holes must be drilled vertically." Br. for Appellant at 37-38. Because KiSKA could not drill the surface grout holes vertically at many of the locations specified in the contract without drilling into existing utilities, KiSKA reasons that WMATA breached its contractual warranty of specifications. We reject KiSKA's argument.

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[17] As WMATA observes on appeal, the applicability of the verb "prevent" to section 205(1.2)(B)(3)(c) "makes no sense grammatically or syntactically." Br. for Appellee at 40 n.15. KiSKA maintains, however, that "[r]ead in context, it is perfectly clear that the verb 'prevent' does not apply to the clause beginning '[m]aintain.'" Reply Br. at 18 n.6.

Section 239(1.1)(B) provided that "[p]re-support chemical grouting shall be preformed [sic] from the existing ground surface at locations shown on the contract drawings." Contract § 239, ¶ 1.1(B). As even WMATA concedes, the contract drawings depicted the surface grout holes as drilled vertically. *See* JA 1001. Yet section 239(3.2)(A) provided that grout pipes were to be installed "horizontally, vertically or inclined, as required." Contract § 239, ¶ 3.2(A). Observing that the contract contained "no clear directive that the [surface grout] holes should be drilled at a particular angle," the district court concluded that "the flexible language of [section 239(3.2)(A)] applies." Third Order at 8-9. Accordingly, the district court held that "the contract permitted [KiSKA] to drill all grout holes, including surface grout holes, 'horizontally, vertically or inclined.'" *Id.* at 9 (quoting Contract § 239, ¶ 3.2(A)).

On appeal, KiSKA argues that the district court's reliance upon section 239(3.2)(A) was misplaced because the provision "did not remotely purport to override any other provisions of the contract requiring particular grout holes to be drilled at particular angles." Br. for Appellant at 40. KiSKA places particular emphasis upon the fact that section 239(3.2)(A) provided that "the contractor shall drill grout holes 'as required.'" *Id.* at 41 (quoting Contract § 239, ¶ 3.2(A)). Because the contract drawings depicted the grout holes as drilled vertically, KiSKA argues that the contract "required" the surface grout holes to be drilled vertically, thus warranting that the surface grout holes *could* be drilled vertically.

We find that KiSKA's reading of the contract places too much emphasis on the contract drawings, while ignoring other crucial provisions of the contract. As WMATA correctly observes, General Provision No. 2 of the contract clearly stated that "[i]n [the] case of [a] discrepancy between Drawings and Specifications, the Specifications shall govern." JA 755. Given that the contract unambiguously indicated that WMATA did not know the location of the utilities and, in addition, expressly

assigned KiSKA the responsibility of ultimately locating the utilities, KiSKA's reading of the contract cannot stand. *See, e.g.*, Contract § 101, ¶ III(D)(18)(a) ("The Contract Drawings show some known public and private utilities in their approximate locations within the limits of the project which are expected to interfere with the work. The Contractor is, however, cautioned that these locations are not guaranteed, nor is there any guarantee that utilities lines in existence within the limits of the project have been shown."); *id.* § 101, ¶ III(D)(18)(b) ("Before commencing construction, the Contractor shall verify the locations of utilities which may be affected by his operations."); *id.* § 207, ¶ 1.5(A)(2) ("[The contractor must] [v]erify by field investigation locations of [utility] facilities within and adjacent to limits of project which may be affected by construction operations."). Read in conjunction with section 239(3.2)(A)'s mandate to drill surface grout holes "horizontally, vertically or inclined, as required," *id.* § 239, ¶ 3.2(A), the aforementioned provisions sufficiently refute KiSKA's warranty argument.[18]

III. Conclusion

For the foregoing reasons, we conclude that (1) sovereign immunity bars KiSKA's tort claims; (2) the contract did not unambiguously provide that the specified dewatering system would maintain the groundwater level two feet below tunnel invert; and (3) the contract did not require KiSKA to drill surface grout holes vertically. The judgment below is therefore

Affirmed.

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[18] Because we conclude that the district court correctly interpreted the contract's dewatering and grout hole provisions, we need not consider WMATA's alternative argument that any error the district court committed in interpreting the contract was harmless.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KiSKA CONSTRUCTION CORPORATION-USA, and KAJIMA ENGINEERING AND CONSTRUCTION, INC., Plaintiffs, v. WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, Defendant.	Civil Action No. 97-2677 (CKK)

MEMORANDUM OPINION

On February 25, 1994, the Washington Metropolitan Area Transit Authority ("WMATA") awarded a contract to KiSKA-Kajima, a joint venture of Plaintiffs KiSKA Construction Corporation-USA and Kajima Engineering and Construction, Inc., to construct a new tunnel for the Washington, DC area subway system ("Metro"). On November 10, 1997, after experiencing various difficulties completing the project, KiSKA-Kajima sued WMATA for Fraudulent Misrepresentation (Count I), Negligent Misrepresentation (Count II), Unilateral Mistake (Count III), Material Breach of Contract (Count IV), and Quantum Meruit (Count V). Before the Court is WMATA's motion to dismiss the complaint for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(h)(3).[1] In support of its motion to dismiss,

[1] This is WMATA's second motion to dismiss, which was filed on the same day as crossmotions for summary judgment. WMATA's first motion to dismiss was denied on June 19, 1998.

WMATA argues that the Court lacks subject matter jurisdiction over all five counts because WMATA has not waived its sovereign immunity for torts occurring in the performance of its governmental or discretionary functions. Upon review of WMATA's motion to dismiss, KiSKA-Kajima's opposition, WMATA's reply, and the allegations contained in the complaint, the Court finds that KiSKA-Kajima's tort claims against WMATA (Counts I and II only) are barred by the doctrine of sovereign immunity.

I. BACKGROUND[2]

Before soliciting bids for the 14th Street Tunnels Project (the "project"), WMATA retained geotechnical consultants to study the feasibility of various tunneling methods and equipment, dewatering systems, and pre-support chemical grouting for the project. One such consultant, GeoEnvironmental, Inc. ("GZA"), prepared a series of three reports containing recommendations for how best to construct the tunnel. WMATA did not disclose GZA's reports to KiSKA-Kajima at any time during the bidding process, nor did WMATA conform the contract to GZA's recommendations. Based on the information provided by WMATA, KiSKA-Kajima submitted a bid for the contract, which was accepted by WMATA. Shortly after beginning work on the tunnel, KiSKA-Kajima began experiencing difficulties with the dewatering system and the excavation methods required by the contract. KiSKA-Kajima told WMATA about these unforeseen complications, which were delaying the progress of the project, but WMATA insisted that KiSKA-Kajima use the methods prescribed by the contract. Forced to complete the project under these circumstances, KiSKA-Kajima incurred additional expenses over the bid amount.

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[2] A more thorough summary of the facts of this case can be found in the Court's Memorandum Opinion of June 19, 1998.

In Counts I and II, KiSKA-Kajima contends that WMATA fraudulently and negligently misrepresented that WMATA would implement an effective dewatering system and that the tunneling methods prescribed by the contract were feasible, while concealing GZA's recommendations that closed face mining should be used, that dewatering would be costly and ineffective, and that pre-support grouting would be ineffective if the dewatering was not effective. As a result of WMATA's misrepresentations and failures to disclose, KiSKA-Kajima avers in Count III that it labored under a unilateral mistake as to the cost, duration, and feasibility of the project. In Count IV, KiSKA-Kajima alleges that WMATA materially breached the contract, including various express and implied warranties contained therein. In the fifth and final count, KiSKA-Kajima seeks compensation for work performed outside the contract under quantum meruit.

II. DISCUSSION

WMATA was created in 1966, when Congress approved an interstate compact among Maryland, Virginia, and the District of Columbia to jointly develop and administer a comprehensive mass transit system for the Washington, DC metropolitan area. *See Beebe v. WMATA*, 129 F.3d 1283, 1285 (D.C. Cir. 1997); D.C. Code Ann. § 1-2431 (1999) (codifying the Washington Metropolitan Area Transit Authority Compact) (the "Compact"). Although WMATA is merely a quasi-governmental entity, its claim to sovereign immunity is well-established. *See Beatty v. WMATA*, 860 F.2d 1117, 1126 (D.C. Cir. 1988) (noting that WMATA shares the immunity enjoyed by the signatory parties to the Compact); *Dant v. District of Columbia*, 829 F.2d 69, 74 (D.C. Cir. 1987) (discussing the scope of WMATA's sovereign immunity); *Morris v. WMATA*, 781 F.2d 218, 222-28 (D.C. Cir. 1986) (holding that WMATA enjoys the same immunity conferred by the Eleventh Amendment on Virginia and Maryland). Section 80 of the Compact waives WMATA's immunity under certain

circumstances, providing in relevant part that WMATA "shall be liable for its contracts and for its torts . . . committed in the conduct of any proprietary function, . . . but shall not be liable for any torts occurring in the performance of a governmental function." D.C. Code Ann. § 1-2431(80). Resolution of WMATA's motion to dismiss hinges on whether the acts and omissions alleged in KiSKA-Kajima's complaint are governmental or proprietary within the meaning of section 80.

Over the years, the DC Circuit has developed a series of three questions to aid courts in distinguishing governmental functions, for which WMATA is immune, from proprietary functions, for which WMATA is amenable to suit.[3] First, the court must "ask whether the activity amounts to a 'quintessential' governmental function, like law enforcement." *See Beebe*, 129 F.3d at 1287 (citing *Burkhart v. WMATA*, 112 F.3d 1207, 1216 (D.C. Cir. 1997)). WMATA is clearly immune from suit for torts arising out of such activities. *See Morris v. WMATA*, 781 F.2d 218, 220-21 (D.C. Cir. 1986). Where, as here, the activity in question cannot be characterized as a "quintessential" governmental function,[4] the D.C. Circuit draws upon the Federal Tort Claims Act's dichotomy between "discretionary" and "ministerial" acts. *See Beebe*, 129 F.2d at 1287. Under this rubric, the court asks first "whether any 'statute, regulation, or policy specifically prescribes a course of action for an employee to follow.'" *Id.* (quoting *Cope v. Scott*, 45 F.3d 445, 448 (D.C. Cir. 1995)). If the course of action is so prescribed, the conduct is ministerial rather than discretionary and WMATA is not immune from suit. *See Burkhart*, 112 F.3d

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[3] Given the breadth of caselaw from this jurisdiction that mines the distinction between governmental and proprietary functions for the specific purpose of defining the scope of WMATA's immunity under section 80, KiSKA-Kajima's reliance on cases from outside this jurisdiction is sorely misplaced.

[4] Happily, WMATA has not attempted to shoe-horn its activities into this narrow category of conduct.

at 1216 (distinguishing statutes that leave room for choice); *Beatty*, 860 F.2d at 1127 (finding that a duty is ministerial "if it involves enforcement or administration of a mandatory duty at the operational level.") (quoting *Jackson v. Kelly*, 557 F.2d 735, 737-38 (10th Cir. 1977). If no course of action is prescribed, the court reaches the final part of its analysis: "whether the exercise of discretion is grounded in social, economic, or political goals. If so grounded, the activity is governmental, thus falling within section 80's retention of sovereign immunity." *Id.* (internal quotations and citations omitted).

Applying this test to the case at bar, the Court finds that the challenged decisions are "susceptible to policy judgment," and therefore immune from judicial review, because they involve planning and design rather than implementation or operation. *See Beatty*, 860 F.2d at 1126-27 (WMATA not immune if plaintiff's nuisance claim is based on operation of the Metro rather than design); *Dant*, 829 F.2d at 74 (WMATA immune from challenge to design of fare collection system); *Warren v. WMATA*, 880 F. Supp. 14, 19 (D.D.C. 1995) (WMATA immune because the choice between two types of glass, both of which conform to the relevant standard, is a discretionary design decision). KiSKA-Kajima cannot point to any statute, regulation or policy that "specifically prescribes" WMATA's choice of tunneling methods or the content of its invitations for bids. *See Burkhart*, 112 F.3d at 1217 (finding that WMATA's broad powers to create and abolish employments and establish a personnel system "hardly constrain WMATA's determination of whom it will employ or how it will train and supervise its employees"); *Warren*, 880 F. Supp. at 17 (noting that the District of Columbia's regulations specifically required that WMATA equip its vehicles with safety glazing materials, affording WMATA discretion among types of materials so long as its choice complies with the standard). WMATA's general obligation to abide by the covenant of good faith and fair

dealing is not the kind of *specific* dictate that renders WMATA's acts merely ministerial.

This lack of mandatory constraints provided WMATA broad discretion in defining the contours of the invitation for bids and the resulting contract with KiSKA-Kajima. KiSKA-Kajima characterizes these decisions as "technical, geologic, engineering, constructability decisions and self-interested decisions not designed to be protected by sovereign immunity," Pl.'s Opp'n at 18, but upon closer examination the Court finds that such choices are susceptible to policy judgment. Like the hiring, training and supervision choices at issue in *Burkhart*, WMATA's choice of tunneling methods requires consideration of budgetary constraints, economic conditions, and the need to ensure public safety. *See Burkhart*, 112 F.3d at 1217. As the DC Circuit noted in *Beatty*, "[t]he cases teach that WMATA will not be liable for determinations made in establishing 'plans, specifications or schedule of operations' for the Metrorail." *Beatty*, 860 F.2d at 1127 (quoting *Dalehite v. United States*, 346 U.S. 15, 35-36 (1953)); *see also Dant*, 829 F.2d at 74 (characterizing the decision to install an automated fare collection system as a "complex design decision approved by WMATA in the exercise of its policy discretion"). Notwithstanding KiSKA-Kajima's efforts to characterize WMATA's decisions as purely technical, the Court finds that the contested decisions implicate "'not negligence but social wisdom, not due care but political practicability, not reasonableness but economic expediency.'" *Warren*, 880 F. Supp. at 19 (declining to second-guess WMATA's decision to use a certain kind of glass for bus windows) (quoting *Cope*, 45 F.3d at 450). Because section 80 renders WMATA "immune from courts' 'second-guessing' through private tort suits 'the political, social, and economic judgments of an agency exercising its regulatory function,'" *Dant*, 829 F.2d at 74, KiSKA-Kajima's tort claims must be dismissed.

III. CONCLUSION

For the reasons stated above, KiSKA-Kajima's tort claims (Counts I and II) must be dismissed for lack of subject matter jurisdiction. The Court rejects WMATA's suggestion that all of KiSKA-Kajima's remaining contract claims are "tort claims masquerading as such." WMATA's Reply at 17. KiSKA-Kajima is clearly entitled to pursue alternative theories of recovery based on the same set of facts, and section 80 specifically waives WMATA's immunity from suit for its contracts. Because KiSKA-Kajima is not seeking punitive damages in connection with its remaining claims, the Court will deny as moot WMATA's motion to dismiss KiSKA-Kajima's request for punitive damages. As for WMATA's efforts to dismiss KiSKA-Kajima's request for pre-judgment interest, the Court will address this issue, if necessary, after the entry of judgment.

An order accompanies this memorandum opinion.

February 7, 2000

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KISKA CONSTRUCTION CORPORATION - U.S.A. **18-10 Whitestone Expressway** **Whitestone, New York 11357** **a Partner in** **KISKA-KAJIMA, a Joint Venture,**	
and	
KAJIMA ENGINEERING AND CONSTRUCTION, INC. **200 S. Los Robles Ave., #400** **Pasadena, California 91101** **a Partner in** **KISKA-KAJIMA, a Joint Venture,**	**CASE NUMBER: 1:97CV02677**
Plaintiff,	**JUDGE: Colleen Kollar-Kotelly**
v.	**DECK TYPE: Civil General**
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, **600 5th Street, N.W.** **Washington, D.C. 20001**	**DATE STAMP: 11/10/97**
Defendant.	
SERVE: **Robert L. Polk, Esq.** **General Counsel and** **Registered Agent** **600 5th Street, N.W.** **Washington, D.C.** **20001**	

COMPLAINT

KiSKA Construction Corporation-U.S.A. and Kajima Engineering and Construction, Inc., doing business as KiSKA-Kajima, a Joint Venture ("KiSKA-Kajima"), by their counsel, hereby bring this Complaint against the Washington Metropolitan Area Transit Authority ("WMATA") and allege as follows:

PARTIES

1. Plaintiff KiSKA-Kajima is a joint venture formed on February 1, 1994 by KiSKA Construction Corporation-U.S.A., a construction company incorporated under the laws of Delaware and with its principal place of business in Whitestone, New York, and by Kajima Engineering and Construction, Inc., a construction company incorporated under the laws of California and with its principal place of business in Pasadena, California.

2. Defendant WMATA is an instrumentality and common agency of the District of Columbia and contiguous States pursuant to the WMATA Compact, P.L. No. 89-774 (1966). WMATA was established to provide and maintain a modern rapid transit system for the city of Washington, D.C. and its neighboring communities.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to D.C. Code § 1-2439 and Article 81 of the WMATA Compact, D.C. Code § 1-2431. Additionally, this Court has jurisdiction pursuant to 28 U.S.C. § 1332 as there is complete diversity between the litigants and the amount in controversy exceeds $75,000 in value.

4. Venue is properly situated in this Court pursuant to 28 U.S.C. § 1391 (a) and (b).

FACTUAL BACKGROUND

INTRODUCTION

5. On or about December 6, 1993, WMATA issued an Invitation for Bids ("IFB") to KiSKA-Kajima and other potential bidders for Contract 1E0023 ("the Contract") for an extension of the Washington, D.C. Metroline rapid transit system.

6. The Contract provided for the construction of approximately 3,200 linear feet of twin, single-track earth tunnels, an access shaft, fan shaft, and vent shaft. The Project is known as Section E-2c, or the Greenbelt Route 14th Street Tunnels.

7. The Contract was part of WMATA's $2.1 billion fast-track plan to construct four major metrorail segments at nearly the same time instead of sequentially as had been done in the past.

8. As a result, WMATA planned to complete 13.5 miles of rapid transit routes 5 years early and save a reported $600 million.

9. The IFB was revised by amendments which WMATA issued on December 13, 1993, December 15, 1993, December 29, 1993, January 6, 1994, January 14, 1994, and January 20, 1994.

10. KiSKA-Kajima and the other bidders possessed the Contract documents, as amended, for less than twelve days before they were required to submit their bids.

11. During this period, KiSKA-Kajima and the other bidders were required, among other things, to analyze the Contract plans and specifications, obtain material, equipment and subcontractor quotes, prepare prices for the various work items and submit a fixed price bid to WMATA.

12. Bids were opened on February 2, 1994, and KiSKA-Kajima was deemed the low responsive and responsible bidder for the Contract.

13. On February 25,1994, WMATA awarded the Contract to KiSKA-Kajima for a fixed price of $42,905,000.00.

14. Section 101, Part IX, of the Contract required that all work be completed within 940 days of Notice to Proceed.

15. WMATA issued Notice to Proceed on April 4, 1994. Thus, KiSKA-Kajima was required to complete all Project work by October 30, 1996.

16. The Contract plans and specifications for the Project required, among other things, the installation of a dewatering system designed by WMATA, the installation of a chemical grout program designed by WMATA, and the use of an open face digger shield specified by WMATA to mine the inbound and outbound tunnels.

17. Under the unique terms of the Contract, WMATA assumed the design responsibilities for the dewatering system, the means and methods of tunneling, the tunneling equipment and the chemical grouting plan.

18. This was the first contract in which WMATA assumed design responsibilities for a dewatering system to be utilized in an underground construction project.

19. WMATA warranted that its design and implementation of the dewatering system would result in a dry, stable and workable subsurface environment thus allowing the bidders to base their estimates of construction costs ideal conditions for tunneling.

WMATA'S DESIGN PROCESS

20. Beginning in the 1960's, WMATA engaged geotechnical consultants to conduct subsurface investigations and analyses of the Greenbelt Route section of the Washington, D.C. Metroline Subway System ("Metro").

21. WMATA hired Mueser Rutledge Wentworth & Johnston ("Mueser Rutledge") as its General Soils Consultant to perform field explorations and laboratory tests and report to WMATA its findings and recommendations regarding subsurface materials along the Greenbelt transit route.

22. As early as 1969, Mueser Rutledge prepared geotechnical reports which identified specific subsurface problems associated with the Greenbelt route.

23. In October 1971, Mueser Rutledge submitted to WMATA its Final Report with respect to the subsurface conditions along the Greenbelt route, including the E-2c section which is the subject of this litigation.

24. In 1974, Mueser Rutledge carried out an investigation at the request of WMATA's Section Designer, C.E. Maguire, Inc. ("Maguire"), to evaluate specific problems in mined tunnels, specifically for Section E-2c of the Greenbelt route.

25. From November 24,1992 to March 4, 1993, GZA GeoEnvironmental, Inc. ("GZA"), an experienced geotechnical consulting firm, prepared a series of three Tunnel Alternatives Reports ("TAR") for WMATA's Section Designer, Maguire, on this Project.

26. WMATA requires a TAR on every contract to discuss in detail the subsurface conditions on the Project, extensively analyze alternative tunnel construction methodologies, and direct specific requirements for the tunneling means, tunneling equipment, pre-support chemical grouting, and the tunnel liner, given the subsurface conditions identified.

27. In the IFB, WMATA referenced and made available to the bidders certain subsurface investigation reports for their information and also made these reports part of the Contract pursuant to General Requirements, Section 101.

28. Pursuant to General Requirements, Section 101, of the Contract, the subsurface investigation reports were made

available to the bidders by WMATA "in order that the contractor may have the same information as is available to [WMATA]."

29. Conspicuous in their absence, the three GZA Tunnel Alternatives Reports prepared for WMATA in 1992 and 1993 were neither made available to the bidders nor incorporated in the Contract.

30. Based on its studies, GZA issued unequivocal directives, warnings and recommendations to WMATA with respect to the proper tunneling methods, tunneling equipment, dewatering system and grouting plan to be utilized by the contractor given the expected subsurface conditions.

31. The TARs were based in part upon the subsurface data presented in two reports prepared by Mueser Rutledge.

32. Additionally, in preparing the first TAR, GZA specifically relied upon:

a. several meetings with WMATA's Project design team;

b. a site visit;

c. interviews of key WMATA staff regarding design requirements and previous soft ground tunneling experience in Washington, D.C.;

d. interviews of tunnel contractors experienced with soft ground tunneling in Washington, D.C.;

e. interviews of tunnel lining manufacturers;

f. interviews of soft ground tunnel boring machine equipment manufacturers; and

g. geotechnical engineering evaluations of ground conditions relative to the proposed tunnels and shafts.

33. GZA's second TAR dated January 1993, which contained even more pointed directives, warnings and

recommendations, was based upon all of the foregoing references plus interviews with dewatering contractors experienced in the Washington, D.C. area and interviews with key members of the Los Angeles Metro System.

34. Moreover, GZA's recommendations in its second TAR were predicated upon a careful consideration of the subsurface conditions, the probability of instituting an effective dewatering system, and the methods used for tunnel excavation for the Project.

35. Two months later, in March 1993, a third TAR was submitted by GZA in which its conclusions were significantly revised. Notably, the only additional referenced basis of its opinions in the third TAR was a meeting before WMATA's Board of Engineering Consultants ("BOEC").

36. In its first TAR, GZA directed WMATA to require the Contractor to use a closed face tunnel boring machine to mine the Project because of the anticipated subsurface conditions.

37. GZA also advised WMATA in the first TAR to strictly prohibit the use of open faced tunneling on this Contract.

38. Additionally, from approximately Station 92 to Station 98, which comprises the first 600 feet of the tunnel, GZA recommended that the Contractor be required to use open cut excavation techniques. That is, in the first 600 feet of the tunnel, GZA directed WMATA to excavate the tunnel from the surface, thus prohibiting mining by any method.

39. The specified tunneling methods for this Project were based, in large part, on the inability of the subject subsurface conditions to be effectively dewatered.

40. Specifically, in the first TAR, GZA characterized the subsurface conditions to be encountered by the Contractor as follows:

> Soil and groundwater along the alignment are characterized by one of two distinct geologic units,

> Pleistocene terrace deposits and Cretaceous granular deposits. Although lithologically similar, they vary significantly in terms of in-situ density. Groundwater for most of the alignment is anticipated to be above the crown with the exception of the last few hundred feet where the groundwater will probably be approximately at spring line. Both the Pleistocene terrace deposits and the Cretaceous deposits contain discontinuous, but highly permeable, lenses of gravel and or sand and gravel which have created substantial face stability problems on previous WMATA projects. Effective dewatering of these permeable lenses is difficult. There are no assurances that, even with fairly extensive dewatering, face stability problems can be entirely eliminated. Although dewatering may be feasible to reduce the impact of these permeable lenses, the fact that these lenses are discontinuous may result in significant cost to the project without a major benefit to face stability or rate of tunneling.

41. Based on the potential inability to effectively dewater the ground even with "fairly extensive" dewatering measures and the anticipated "face stability problems", GZA required the use of a closed face tunnel boring machine to excavate the tunnels and recommended that the use of open face tunneling be "strictly prohibited", stating:

> Therefore, some type of closed face tunnel boring machine (TBM) will be required for the project. Although open face tunneling may be possible in the P2 stratum; we recommend that open face tunneling be strictly prohibited on this contract. Obviously, access to the TBM face will be required though should boulders/cobbles be encountered. The use of compressed air is not judged as an

> alternative tunneling technique due primarily to the limited cover available at the beginning of the alignment and cost considerations.

42. With respect to the first 600 feet of the tunnel (Stations 92-98), GZA directed WMATA to prohibit mining by any method.

43. In that section of the alignment, GZA recommended open cut construction as a result of the anticipated subsurface conditions:

> The major tunnel construction challenges of the project are from Station 92-98 where a combination of, limited cover, a curved alignment extending from the shaft to 14th Street, and permeable strata within the tunnel face, will lead to difficult tunneling conditions. Due to these factors we recommend that a work shaft be constructed at V Street to aid in the general dewatering of the area. Furthermore, we recommend that as much of the outbound tunnel be constructed using open cut techniques.

44. In its second TAR dated January 1993, GZA recommended that WMATA specify an Earth Pressure Balance ("EPB") machine, a particular type of closed face tunnel boring machine, to excavate the tunnels based upon the substantial risk that the ground could not be dewatered which would present face stability problems and unsafe working conditions.

45. In addition to recommending an EPB machine as the particular type of closed face tunnel boring machine to be used, GZA mandated that no option for open face tunneling should be allowed by WMATA:

> The variable soil conditions at the tunnel face in conjunction with groundwater conditions above the tunnel crown for most of the alignment dictate the use of closed face tunneling machines.

46. As of January 1993, WMATA knew that the closed face tunnel boring technique was the only appropriate mining technique which could be used given the variable soil and groundwater conditions present at the site and the sound engineering advice of its consultants.

47. In the second TAR, GZA also advised WMATA that the excavation rate using an EPB was twice as slow as open face excavation methods.

48. Despite the additional time and corresponding extra costs associated with the closed face tunnel boring machine, GZA maintained its position that open faced mining be prohibited:

> Although EPB tunneling is considerably slower than open face excavation methods, by about a factor of two, as discussed above, dewatering considerations dictate closed face mining methods.

49. In comparing the viability of alternative liner systems for the project, GZA again analyzed the advance rates (and corresponding time and costs) associated with closed face EPB machines versus open faced machines, concluding as follows:

> Temporary liners used with cast-in-place methods are most appropriate where an open faced TBM is used in conjunction with a dewatering system or under compressed air. The erection time of liners becomes less important with closed face EPB machines as the advance rates are a factor of two less than open faced machines. We do not believe the majority of the soils along this alignment can be effectively dewatered; thus, precluding consideration of open face mining methods. Dewatering, if attempted, would, in our opinion, be costly and probably ineffective. In consideration of these two factors, the risk associated with tunneling in a highly urban environment using an open faced

> tunneling method with ungasketed liners is judged excessive.

50. As the economics of a two pass liner system are predicated upon using an open face shield, GZA concluded:

> Although not a direct requirement, the economics of the system [two pass liner system] requires relatively high production rates during tunneling. Therefore, open faced machines are typically part of that system. Open faced tunneling in conjunction with dewatering is not judged a viable construction technique on this Contract.

51. On March 4, 1993, GZA issued its third and final TAR.

52. The third TAR was not based on any additional information received after the submission of the first two TARs, but was submitted after a meeting was held with WMATA's Board of Engineering Consultants.

53. In its third TAR, GZA reversed its position that "open faced tunneling in conjunction with dewatering [was] not judged a viable construction technique on the Contract" and that open face tunneling was "strictly prohibited".

54. Instead, GZA stated:

> We believe that the tunnels can be successfully constructed with either a closed face tunnel boring machine (TBM) in combination with a gasketed lining system and limited dewatering; or an open faced shield in combination with a primary liner and cast-in-place concrete final liner. Extensive dewatering will be an essential element of the open faced shield option. Provisions for removal of boulders from in front of the TBM would be an essential requirement of the closed face approach.

* * *

> The tunnels can be successfully constructed using an open faced shield, however, because of concern about the difficulties of effectively dewatering the terrace and cretaceous sands, we recommend that the Contractor be required to improve and presupport the ground through extensive grouting and systematic dewatering for the entire Contract. These provisions are especially critical to the first 400 feet of the Contract from Sta. 96 to Sta. 100.

55. Accordingly, after its meeting with WMATA's Board of Engineering Consultants, GZA now recommended open face mining as a viable tunneling option. GZA, however, stated that open faced mining was an alternative to closed face tunneling only if performed in conjunction with "extensive dewatering" and "extensive grouting".

56. Despite acquiescing in WMATA's desire to allow open face mining as a tunneling option on the Project, GZA maintained that such a tunneling method was wholly predicated upon the ability to effectively dewater the ground, an accomplishment which was previously deemed not possible for the majority of the soils along this alignment.

57. In addition to making open faced tunneling entirely dependent upon effective dewatering, GZA still reiterated its reservations as to whether this was even possible, warning WMATA as follows:

> Where groundwater control is not a major issue, open face tunnel shields are very effective permitting adequate ground support combined with rapid excavation rates. Through our research of past experience on the WMATA system and analyses of the subsurface conditions for this alignment, we judge that effective dewatering of the alignment is at best going to be difficult. Therefore, in order to reduce the potential for

> ground loss and resulting surface settlement, as a result of seepage into the tunnel either through the liner or at the shield face, we believe that an extensive pre-support grouting/ground improvement program should be required for most of the alignment.

58. Although allowing open face tunneling as an alternative mining method, GZA told WMATA that it was contingent upon effective dewatering of the alignment which "at best" was going to be difficult.

59. With respect to approximately the first 600 feet of the tunnel, from Station 92 to Station 98, GZA confirmed its recommendation that no mining be allowed due to the unfavorable subsurface conditions.

60. After issuance of the final TAR, GZA detailed for WMATA's Section Designer the scope of the dewatering which was necessary in order to allow open face tunneling methods to be used.

61. On May 3, 1993, after reviewing GZA's final TAR, WMATA provided written comments to GZA.

62. On May 25, 1993, in response to WMATA's comments regarding GZA's recommendations, GZA stated:

> Regardless of the pre-support grouting, in our opinion dewatering must be performed on this contract. Our concerns for grouting are to limit the development of chimneys to the ground surface not only in the beginning of the alignment where we have limited soil cover, but also in the non-cohesive P2 deposits up-station. The grouted arch will not assist in limiting loss of ground beyond the arch if groundwater is not depressed the recommended two feet below tunnel invert

63. As of May 1993, WMATA knew that the pre-support grouting would not be effective unless the groundwater table was lowered two feet below the invert or floor of the tunnel.

64. Additionally, six months before issuance of the IFB, WMATA recognized that open face mining could only be used if the groundwater level was effectively maintained two feet below the invert of the tunnel.

65. Thereafter, GZA was asked by WMATA's Section Designer to perform a quality control ("QC") review and commentary of the draft Contract plans and specifications as they relate to the geotechnical aspects of the Project.

66. With respect to draft Specification Section 205, *Dewatering*, GZA stated that it was imperative to open faced tunneling that the groundwater be lowered two feet below the invert of the tunnel and that the Contractor be required to use "whatever means necessary" to achieve this objective:

> The dewatering specification must contain stronger language as this is a key component to the success of open face tunneling. Specifically, language such as "the contractor shall use whatever means necessary to dewater the alignment to 2 feet below tunnel invert; including but not limited to, deep wells, shallow wells, ejector wells and well points", is a minimum. Reference should also be given to the geotechnical report where our concerns with regard to dewatering are amplified.

67. Thus, GZA not only defined the necessary extent of the dewatering effort for WMATA's Section Designer (i.e., groundwater must be lowered 2 feet below the tunnel invert), GZA also advised WMATA that, at a minimum, the Contractor should be charged with the responsibility to use "whatever means necessary" in order to achieve this requirement.

WMATA'S MATERIAL MISREPRESENTATIONS AND CONCEALMENTS

WMATA's Misrepresentations With Respect to Prescribed Tunneling Methods

68. In contravention of the express directives, warnings and recommendations of its geotechnical consultants, WMATA contractually dictated that the Contractor use open face tunneling methods to mine the tunnels prohibited use of a closed face tunnel boring machine (including an EPB) and, except for a small and necessary access shaft, prohibited using open cut techniques in the first 600 feet of the alignment.

69. Ignoring its geotechnical design team, WMATA mandated open faced tunneling techniques without allowing the contractor the opportunity to devise and implement its own dewatering plan to lower the groundwater the required 2 feet below the tunnel invert or informing the bidders of GZA's explicit concerns regarding whether the alignment could even be dewatered to this necessary level.

70. WMATA's first misrepresentation regarding tunneling methods which was in direct contravention of its geotechnical engineers' recommendations was to dictate excavation of the tunnels using the open face mining method.

71. WMATA not only prescribed the use of an open face digger shield to excavate the tunnels, it expressly prohibited the use of a closed face tunnel boring machine.

72. Under the express terms of the Contract, WMATA eliminated any option to use closed face tunneling and failed to explain in the Contract, except for a single sentence alluding to the presence of unidentified boulders, why closed face tunneling techniques were not considered appropriate.

73. Contrary to the sole reason WMATA gave for excluding the closed face tunneling option, GZA maintained, even in its

final TAR, that boulders would not inhibit the use of a closed face TBM:

> We believe that the tunnels can be successfully constructed with either a closed face tunnel boring machine (TBM) in combination with a gasketed lining system and limited dewatering; or an open faced shield in combination with a primary liner and cast-in-place concrete final liner. Extensive dewatering will be an essential element of the open faced shield option. Provision for removal of boulders from in front of the TBM would be an essential requirement of the closed face approach.

74. In fact, the potential risk of encountering boulders with a closed face EPB was considered and dismissed in GZA's January 14, 1993 TAR. In that GZA report, the closed face EPB tunneling machine was not only considered an option but was deemed a requirement despite the potential presence of boulders.

75. Contrary to the affirmative representations in the Contract, WMATA knew that state of-the-art EPBs were more than capable of either machine mining boulders or providing access to the heading to allow for the removal of boulders should they be encountered.

76. Indeed, WMATA prepared a report in February 1992 in which it concluded that the advantages of a one-pass system (as evidenced by five closed face TBM contracts) outweighed the advantages of a two-pass liner (as evidence by several open face shield contracts) in the same type of sands and clays as present in this Contract.

77. With respect to the first 60 feet of the tunnel, WMATA once again ignored GZA's recommendations and failed to disclose material facts to the bidders.

78. Contrary to GZA's recommendation that the first 600 feet of the tunnel alignment from Station 92 to Station 98 be

excavated by the open cut method (i.e., without mining), WMATA again dictated the use of open face mining.

79. WMATA gave no explanation as to why this admittedly troublesome area could not be excavated by open cut techniques rather than mined with an open face digger shield as required under the Contract.

WMATA's Misrepresentations With Respect to the Prescribed Dewatering System

80. WMATA also knowingly misrepresented the facts with respect to the design of the dewatering system.

81. In Contract Subsection 205.1.2.B to Section 205, *Dewatering*, WMATA provided:

* * *

> 2. For mined earth tunnels, a minimum dewatering system is shown on the Drawings. The various procedures for control of groundwater shall be performed under the supervision of specialist with experience in responsible control of work similar to that proposed for control of groundwater for the project and who have successfully directed such work on similar projects.
>
> 3. For mined earth tunnels, additional wells beyond the specified minimum dewatering system may be required to effectively reduce hydrostatic pressure and control groundwater in soil surrounding each tunnel in order to prevent the following:
>
> a. Heaving of the invert, blowups, hazardous seepage and sudden flow of soil in tunnel face.
>
> b. Loss of ground and surface subsidence.
>
> c. Maintain groundwater 2 feet below invert.

82. Based upon the foregoing specifications, WMATA contractually promised the bidders that if WMATA's minimum dewatering system was not entirely successful in effectively reducing hydrostatic pressure and controlling groundwater in the soils surrounding each tunnel, WMATA would require additional wells to "prevent" heaving of the invert, blowups, hazardous seepage, flow of soil in the face, loss of ground and surface subsidence and to "maintain" groundwater two (2) feet below the invert.

83. WMATA's design of the minimum dewatering system was issued to the bidders in Amendment No. 1, on December 13, 1993, or approximately one week into the bidding process.

84. The dewatering system dictated by WMATA depicted 61 dewatering wells spaced approximately 100 feet apart along the alignment.

85. Because WMATA was contractually responsible for directing the installation of additional wells "to effectively reduce hydrostatic pressure and control groundwater" in order to, among other things, "maintain groundwater 2 feet below the invert", WMATA identified the number and type of potential additional dewatering wells in the Bid Unit Price Schedule.

86. The Bid Schedule defines the potential additional dewatering wells as follows:

Additional Dewatering Wells		
a.	Deep Wells	30 ea.
b.	Shallow Wells	30 ea.
c.	Modification of Control Piezometers to Dewatering Wells	15 ea.

87. WMATA's dewatering system called for 61 widely spaced dewatering wells in its "minimum" system and potentially 60 more wells to be required by WMATA in order to meet the design objectives warranted by WMATA.

88. If WMATA's stated design criteria still were not achieved, WMATA was obligated to direct the modification of 15 control piezometers to dewatering wells.

89. In all, WMATA's dewatering system design consisted of a maximum of 121 dewatering wells and the conversion of 15 piezometers to dewatering wells.

90. With respect to the design of the dewatering system, WMATA concealed the fact that in 1993, GZA designed and submitted to WMATA a dewatering system for this Project which depicted approximately 225 dewatering wells.

91. Upon information and belief, WMATA directed GZA to design a dewatering system which would "absolutely" draw down the water table below the tunnel invert.

92. GZA's 225-well dewatering stem design depicted wells very closely spaced along the east and west sides of the tunnel alignment.

93. Consequently, GZA's dewatering system depicted over 300% more dewatering wells than shown in WMATA's minimum dewatering system and approximately 100 more wells than WMATA promised would be directed, if necessary, to meet the stated design requirements.

94. WMATA concealed from KiSKA-Kajima and the other bidders GZA's 225-well dewatering system design and failed to take steps to implement this system during performance of the Contract.

95. In addition to providing KiSKA-Kajima with a dewatering design which WMATA knew was entirely inadequate based upon the express recommendations of its geotechnical consultants, WMATA also failed to follow sound engineering practices and the advice of its consultants in developing the design of the dewatering system.

96. In deciding to become the first owner in the United States to assume the design responsibilities for a dewatering

system on a construction project, WMATA prescribed a minimum design without making the Contractor responsible for any supplementary measures which may have proven necessary to meet the contractually mandated objectives.

97. By doing so, WMATA denied KiSKA-Kajima and the other bidders the opportunity to include in their bids the costs of augmenting the dewatering system during contract performance based upon their own prebid geotechnical analyses should the system fail to meet the performance criteria set forth in the Contract.

98. WMATA also failed to perform a comprehensive program of pumping tests in order to accurately determine the scope and cost of the required dewatering effort.

99. In accordance with the advice of its geotechnical consultants, WMATA realized that a comprehensive program of pumping tests was required to penetrate all zones that would be pumped during dewatering.

100. As WMATA unilaterally decided to assume all responsibility for the dewatering system design, WMATA retained Rummel, Klepper & Kahl Consulting Engineers ("RKK") to perform a pumping test analysis as "support" for its minimum design.

101. RKK was retained to prepare a geohydrologic study regarding the performance and analysis of pumping tests on the Project.

102. However, WMATA only engaged RKK to perform a single pump test in one isolated area along the 3,200 foot alignment composed of extremely variable subsurface conditions.

103. On August 13, 1993, RKK entered into a subcontract with Moretrench American Corporation ("Moretrench") to conduct the test.

104. Pursuant to the pumping test which was completed on October 8, 1993, RKK concluded as follows:

> From the limited soils made available to Moretrench American Corporation, it appears that numerous soil interfaces will occur within the limits of the excavation and immediately below. A predrainage system will only be able to effect (sic) water in the permeable zones and then with limited effect directly above each interface. The magnitude of inflow of this residual is a matter of technique; for instance, an open cut excavation would require sand bagging and ditching on a bench along the interface to prevent movement of soil into the excavation. It would be desirable, in this instance, to use closely spaced dewatering devices in order to minimize the amount of residual water above interfaces. In the case of a slurry trench or a structured slurry wall, a complete cut-off can be anticipated and no dewatering would be required. H-pile, with lagging and sheet piling are two cases in between the extremes. Excavation and dewatering methods must be closely coupled in order to minimize movement of soils into the open excavation. Criteria must be established by the GC and Engineer for water levels outside the excavation relative to subgrade and impermeable interfaces. These water levels must be monitored and the pumping system operated (most likely continuously) to maintain the requirements throughout construction.
>
> Please note the results from this pumping test are applicable only to this area of the alignment. The hydrologic parameters could vary significantly over the entire E-2 portion of the subway construction.

105. As RKK's pumping test did not penetrate all zones that were to be pumped during dewatering, WMATA should not have relied upon the results of the RKK pumping test to design the dewatering system for the Project.

106. In fact, RKK warned WMATA that its analysis was based on "limited soils data" and that "the results from this pump test [were] applicable only to this area of the alignment."

107. Therefore, in addition to disregarding and concealing GZA's dewatering plan, the dewatering system designed by WMATA as based upon limited subsurface data which was not representative of the ground conditions throughout most of the alignment.

WMATA's Misrepresentations With Respect to Chemical Grouting

108. WMATA also knowingly made material misrepresentations and concealed essential information with respect to the quantity, method, and location of the chemical grouting to be placed on the Project.

109. Moreover, WMATA again assumed the responsibilities for this work, thus precluding KiSKA-Kajima and the other bidders from developing their own grouting plans based on their own geotechnical investigations.

110. In its review of the draft Contract plans and specifications, GZA advised WMATA that the Contractor, not WMATA, must have exclusive control over the design and implementation of the grouting plan:

> As with the dewatering specification, both sections 239 and 240 [Chemical Grouting and Compaction Grouting] require stronger language. This is a performance specification, it is up to the Contractor to devise methods that achieve the intent of the Specifications.

111. Notwithstanding GZA's directives to issue a performance and not a design specification, WMATA assumed control over the design of the pre-support grouting plan, just as it did the dewatering plan.

112. In Contract Specification 239, *Pre-Support Grouting*, WMATA stated in paragraph 1.1.B:

> Pre-support chemical grouting shall be performed from the existing ground surface at locations shown on the contract drawings. It is the intention of the surface grouting program to create a continuous arch above the crown of the tunnel from the bulls eye of the tunnel forming a 120 degree arch. The grouted arch should extend at least two tunnel diameters in front of the shield prior to advancing the tunnel.

113. Contract Drawing No. M904-44 depicts vertically installed grout pipes in a diamond grid layout at 5 foot centers. Based upon the pattern and location of the specified grout holes shown on the Contract Drawing, WMATA required the installation of approximately 5,000 grout pipes.

114. At the pre-bid conference, WMATA confirmed that the grout pipes were required to be installed as depicted in the Contract Drawings:

> *Question*:
>
> With reference to the pre-support grout zone, is it the designers intent to install all grout pipes throughout the designated zone? And, if so, at what spacing are the rows to be installed? (Sheet M904-44 Sec. A-A).
>
> *Answer*:
>
> Grout pipes are to be installed in a 5 foot diamond grid laid out in accordance with Section A-A Sheet M904-44 (Refer to Longitudinal Section).

115. In addition to the number and location of grout pipes, WMATA dictated the chemical grouting materials, equipment and procedures, including the grout mixing method, injection procedures and gel times.

116. With respect to the estimate quantity of chemical grout to be placed, WMATA specified 110,000 cubic feet (cf) in the Unit Price Bid Schedule.

117. Ignoring GZA's recommendations to issue a performance specification which made the Contractor responsible for grouting, WMATA dictated the method, location and estimated quantity of grout to be placed.

118. As with the dewatering requirements, however, WMATA misrepresented and concealed material facts which were imperative to an effective grouting plan and the efficient prosecution of the work.

119. WMATA engaged its Section Designer to design a grouting program to be implemented in conjunction with the dewatering system to control groundwater and stabilize the ground.

120. WMATA's Section Designer, at WMATA's direction, prepared a grouting plan to be used in conjunction with its 225-well dewatering system.

121. In their grouting plan, WMATA' consultants estimated that approximately 400,000 cf of chemical grout would be necessary based upon the anticipated subsurface conditions.

122. Like GZA's proposed dewatering system, the grouting plan was submitted to WMATA for consideration and incorporation in drafting the Contract plans and specifications.

123. The recommended grouting program, like the recommended dewatering plan, was disregarded by WMATA and concealed from KiSKA-Kajima and the other bidders.

124. By including only 110,000 cf in the Bid Unit Schedule, WMATA realized that there would be a tremendous chemical

grout quantity overrun during Contract performance. Therefore, WMATA recognized that by deliberately understating the quantities of chemical grout to be placed, the base bids would be substantially lower.

125. WMATA's material misrepresentation also induced a lower unit price for chemical grouting because an accurate representation of quantities would have necessitated additional crews, extra specialty equipment, additional supervisory personnel, overtime and additional shifts.

126. WMATA also concealed from KiSKA-Kajima and the other bidders material facts regarding GZA's proposed method and location of chemical grouting.

127. Contrary to the surface grouting which was dictated by WMATA, GZA recommended that the grouting be performed from the face, stating:

> For the main line tunnels grouting is recommended to be performed from the face of the TBM to the crown of the tunnel. Grouting should be performed to create a continuous arch above the crown of tunnel from bulls eye of tunnel to create a 120 degree arch. The arch should extend at least two tunnel diameters in front of the shield. The minimum recommended thickness of the grouted arch should be 5 feet. Grouting should be performed sequentially during liner erection and prior to shield advance so as to continuously maintain a minimum of two tunnel diameters of pre-support grout in advance of tunneling.

128. WMATA, recognizing that grouting from the face would result in substantially lower tunneling productivity rates and corresponding higher bids, disregarded and concealed GZA's recommendation and specified that grouting be performed from the surface.

Impacts During Contract Performance Resulting From WMATA's Misrepresentations And Concealments

129. KiSKA-Kajima relied to its economic detriment on WMATA's misrepresentations and concealments with respect to the tunneling methodology, tunneling equipment, dewatering system and grouting program in both estimating and performing the Contract.

130. As WMATA assumed control over the design and implementation of the dewatering and grouting plans and specified the equipment to be used, KiSKA-Kajima had no choice but to estimate and, thereafter, perform the Contract as dictated by WMATA.

131. WMATA required the use of the open face digger shield to excavate the tunnels, prohibited the use of a closed face tunnel boring machine, including an EPB, and designed and assumed control over the implementation of a deficient dewatering system and grouting plan.

132. Therefore, KiSKA-Kajima was forced to estimate, plan and perform its work based upon WMATA's requirement that open faced tunneling be utilized throughout the Project and express representations that the subsurface conditions would be ideal for such an operation.

133. KiSKA-Kajima further relied to its detriment on WMATA's express representation that should the dewatering system fail to meet the objectives warranted under the Contract, WMATA, not KiSKA-Kajima, would continue to direct the specified supplemental dewatering wells until these objectives were met.

134. After Contract award, KiSKA-Kajima engaged Moretrench American Corporation ("Moretrench"), an experienced dewatering contractor, as its subcontractor to perform dewatering well installation and maintenance for the Project.

135. The first dewatering well was activated on September 28, 1994, about four and a half months prior to the planned start of tunnel excavation.

136. To maximize the operating time of the dewatering system to achieve the anticipated drawdown effect of the minimum design, KiSKA-Kajima commenced dewatering well operation as early as possible, activating all dewatering wells from the Access Shaft to V Street by January 3, 1995, and all dewatering wells up to Florida Avenue by February 8, 1995.

137. In doing so, KiSKA-Kajima was able to monitor the progress of WMATA's dewatering system design and determine its effect on achieving drawdown from an early stage in the Contract schedule.

138. As early as October 26,1994, KiSKA-Kajima informed WMATA that the dewatering wells located at the Access Shaft were insufficient to effectively lower the water table in that area to the required level.

139. As KiSKA-Kajima continue to install and activate dewatering wells, it became readily apparent from the observation wells at the water level was not being drawn down to the level required to begin tunneling.

140. Based upon the provisions of the Contract which required WMATA to direct the installation of additional wells to lower the groundwater level to 2 feet below the invert, KiSKA-Kajima requested that WMATA direct the installation of additional dewatering wells.

141. KiSKA-Kajima promptly advised WMATA that additional wells would be required to achieve the Contract-specified drawdown of two feet below the invert of the tunnel.

142. KiSKA-Kajima again raised these concerns regarding the WMATA-designed dewatering well system at the Dewatering Meeting held on January 26, 1995.

143. Despite its knowledge that open faced tunneling was predicated upon the maintenance of the groundwater two feet below the tunnel invert and that GZA's proposed dewatering design called for 225 dewatering wells, WMATA failed to direct the installation of additional wells sufficient to lower the groundwater two feet below the tunnel invert.

144. On February 21, 1995, KiSKA-Kajima again notified WMATA that the minimum design dewatering system failed to achieve the necessary drawdown.

145. On February 21, 1995, KiSKA-Kajima asked how and when WMATA would direct the necessary installation of additional wells as required under the Contract and specifically requested the design calculations for the dewatering system.

146. Despite its exclusive knowledge that the dewatering system as designed was deficient and that an effective drawdown below the invert was imperative to open face mining, WMATA took no action and refused to provide KiSKA-Kajima with the requested design calculations.

147. At a subsequent Dewatering Meeting on February 23, 1995, KiSKA-Kajima informed WMATA that the "time to do additional work to install dewatering wells is past critical."

148. WMATA again failed and refused to acknowledge the deficiencies in its system or direct additional wells as required under the Contract.

149. On March 9, 1995, KiSKA Kajima again objected to WMATA's decision not to direct the installation of additional dewatering wells.

150. As of March 1995, WMATA had failed to direct any additional dewatering wells.

151. At a subsequent Dewatering Meeting held on March 21, 1995, WMATA admitted that its dewatering system would not achieve the Contract-required drawdown and stated that additional dewatering wells would not improve the conditions.

152. At a Partnering Meeting held on April 6, 1995, WMATA further acknowledged that the requirement to drawdown groundwater from Florida Avenue South would not be achieved.

153. Despite acknowledging that its dewatering specification would not achieve the contractually-required drawdown, WMATA continued to dictate the use of an open face digger shield to mine the tunnels, resulting in substantial impacts, delay, disruption, safety risks and financial harm to KiSKA-Kajima.

154. Instead of directing KiSKA-Kajima to install as many additional dewatering wells as necessary in order to achieve the contractually warranted drawdown of groundwater to two feet below the invert, WMATA forced KiSKA-Kajima to tunnel in dangerously wet conditions.

155. WMATA's failure to design and thereafter implement a dewatering system which met the contractually warranted requirements resulted in subsurface conditions which WMATA was obligated to prevent.

156. KiSKA-Kajima encountered sudden and substantial inflows of water at the tunnel face, highly unstable soils, heaving of the invert and surface subsidence.

157. Not only was the groundwater level not lowered two feet below the tunnel invert as promised, it remained above the springline for much of the alignment and, at times, above the crown of the tunnel.

158. WMATA's directed tunneling technique was incompatible with this environment, causing KiSKA-Kajima to suffer a dramatic loss of productivity and posing great danger to the tunnel personnel, inspectors, and the public.

159. Despite the fact that KiSKA-Kajima's and WMATA's observations consistently indicated that groundwater remained well above the invert of the tunnels, WMATA refused to direct

KiSKA-Kajima to install a sufficient number of additional dewatering wells in order to achieve the warranted conditions.

160. The excessive water and unstable soils which pervaded the tunnel face severely hampered tunnel excavation.

161. KiSKA-Kajima encountered water inflows in the tunnel as high as 50 gallons per minute, which devastated KiSKA-Kajima's mining progress and rendered its planned schedule and sequence of the work meaningless.

162. KiSKA-Kajima encountered uncontrollable seepage at the tunnel face throughout the alignment, which resulted in KiSKA-Kajima's inability to keep the open face digger shield on course.

163. The excessively wet and unstable soil conditions caused the digger shield to dive off line and grade on numerous occasions, resulting in multiple misalignments of the tunnel beyond the tolerances specified in the Contract.

164. The worst such misalignment occurred within the first 600 feet of the tunnel, where GZA expressly recommended open cut excavation and prohibited mining altogether.

165. As a result, KiSKA-Kajima's progress was suspended and adversely impacted as it took exceptional measures to realign and reorient the tunneling machine to return and keep it on line.

166. Because the excavated material was excessively wet, the digger shield conveyor belt repeatedly got stuck during excavation. The conveyor system, an integral component of the excavation system, is used to transport the excavated material from the heading to the back of the tunneling machine where the muck is ultimately transported by muck cars out of the tunnel.

167. KiSKA-Kajima often had to excavate the tunnels by hand to assist the conveyor systems.

168. KiSKA-Kajima was forced to modify the digger shields in order to mine through the wetter material.

169. On May 17, 1995, WMATA and KiSKA-Kajima held a Tunnel Misalignment Meeting at which KiSKA-Kajima advised WMATA that its dewatering system's failure to achieve the anticipated groundwater drawdown and to control water inflows caused the tunnel misalignments.

170. Thereafter, on May 18, 1995, KiSKA-Kajima requested reimbursement for all additional costs resulting from the tunnel misalignments.

171. WMATA rejected KiSKA-Kajima's contention that the dewatering system's failure to achieve the requisite drawdown caused the tunnel alignment problems, and shifted blame for these misalignment problems to KiSKA-Kajima.

172. At a Dewatering Meeting on June 13, 1995, rather than directing the additional wells as was required under the Contract, WMATA unilaterally determined that directing additional wells was not "economically feasible."

173. On June 23, 1995, instead of accepting responsibility for the failure of its dewatering system to achieve the required drawdown and prevent water seepage and sudden flow of soil in the tunnel face, WMATA notified KiSKA-Kajima that all tunnel realignment costs would be charged to KiSKA-Kajima.

174. Throughout the remainder of tunnel excavation work, KiSKA-Kajima repeatedly apprised WMATA of the unexpected and dangerous inflows and running soils.

175. The majority of the water infiltration took place above the spring line and closer to the crown of the tunnel; however, the impacts pervaded virtually the entire tunnel alignment in every aspect of the work.

176. The excessive water inflows significantly impeded advance rates, caused prolonged suspensions of work, and

rendered the pre-support grouting ineffective, thus creating voids above the tunnel.

177. On October 18, 1995, KiSKA-Kajima notified WMATA of the dramatic impact the water inflows were having on its tunneling operation productivity rates.

178. WMATA ultimately directed the installation of only an additional 25 wells, none of which were operational for 90 days prior to tunneling as prescribed in the Contract and several of which WMATA positioned so that they were destroyed after only a few days of operation by the tunnel excavation.

179. Of the 25 additional wells directed by WMATA, only 3 operated for more than 35 days.

180. Four of the additional wells were in operation for less than 10 days before they were destroyed by the tunnel excavation as a result of their specified location.

181. The 25 additional wells installed pursuant to WMATA's untimely directives were superficial and insignificant considering the excessive water inflows and running soils encountered by KiSKA-Kajima.

WMATA's Additional Improper Acts and Omissions

182. WMATA provided incomplete, erroneous and inaccurate Contract plans and specifications regarding, among other things:

a. Contract-specified tunneling equipment;

b. chemical grout work, including chemical grout work sequencing, grout hole drilling methods and grout quantities;

c. the number, locations, elevations and dimensions of the numerous subsurface utilities;

d. the Project's dewatering system;

e. the bridge deck framing in the Fan Shaft and Vent Shaft;

f. the installation of contact grouting;

g. precast tunnel liner segments; and

h. the installation of the protective mud slab for the tunnel invert.

183. WMATA, during the design phase, failed to coordinate the Project with numerous Washington, D.C. utility companies and local permit agencies.

184. WMATA interfered and failed to cooperate with KiSKA-Kajima in performance of the Project work.

185. Despite repeated requests by KiSKA-Kajima throughout Contract performance for change orders and appropriate time extensions to compensate KiSKA-Kajima for the additional costs and delays to the Project schedule caused by WMATA, WMATA continuously refused to accept responsibility for its numerous acts and omissions.

186. WMATA ordered that KiSKA-Kajima meet the Contract milestones unadjusted for excusable and/or compensable delays.

187. Throughout Contract performance, WMATA expressly and constructively directed KiSKA-Kajima to accelerate its work.

188. KiSKA-Kajima, in response, did accelerate the Project work.

189. KiSKA-Kajima has faithfully performed all requirements of its Contract with WMATA, and all work under the Contract has been accepted by WMATA.

COUNT I

FRAUDULENT MISREPRESENTATION

(Fraudulent Inducement of the Contract)

190. Paragraphs 1 through 189 of this Complaint are hereby realleged and incorporated by reference as if fully repeated herein.

191. WMATA represented to KiSKA-Kajima that open face tunneling could be used to safely and efficiently excavate the tunnels.

192. WMATA represented to KiSKA-Kajima that WMATA was able to and indeed would implement its own dewatering plan to lower the groundwater 2 feet below the tunnel invert.

193. WMATA concealed its geotechnical consultants' directive to use closed face mining techniques to excavate the tunnels.

194. WMATA represented to KiSKA-Kajima that closed face mining could not be used to excavate the tunnels.

195. WMATA represented to KiSKA-Kajima that boulders prohibited the use of a closed face TBM.

196. WMATA concealed that state-of-the-art EPBs were more than capable of either machine mining boulders or providing access to the heading to allow for the removal of boulders should they be encountered.

197. WMATA represented to KiSKA-Kajima that the first 600 feet of the tunnel alignment could be efficiently and safely excavated using open face mining techniques.

198. WMATA concealed from KiSKA-Kajima that WMATA's geotechnical consultants recommended that the first 600 feet of the tunnel be excavated by the open cut method.

199. WMATA concealed from KiSKA-Kajima that the variable soil conditions at the tunnel face in conjunction with the groundwater conditions above the tunnel crown for most of

the alignment dictated the use of closed face tunneling machines.

200. WMATA concealed from KiSKA-Kajima that the majority of the soils along the tunnel alignment could not be effectively dewatered, thus precluding consideration of open face mining methods.

201. WMATA concealed from KiSKA-Kajima that dewatering, in the opinion of WMATA's geotechnical consultants, would be costly and probably ineffective.

202. WMATA concealed from KiSKA-Kajima that the open face mining technique required by WMATA on the Project was wholly predicated upon the ability to effectively dewater the ground 2 feet below the invert of the tunnel.

203. WMATA concealed from KiSKA-Kajima that the pre-support chemical grouting would not assist in limiting loss of ground if the groundwater was not depressed 2 feet below the tunnel invert.

204. WMATA represented to KiSKA-Kajima that its design and implementation of a dewatering system would prevent heaving of the invert, blowups, hazardous seepage, sudden flow of soil in the tunnel face, and loss of ground and surface subsidence, and would maintain groundwater 2 feet below the tunnel invert.

205. WMATA represented to KiSKA-Kajima that if WMATA's minimum dewatering system was not successful in achieving the objectives set forth in Paragraph 204 of this Complaint, WMATA would require the installation of additional wells until these objectives were met.

206. WMATA represented to KiSKA-Kajima that its dewatering system design consisting of a maximum of 121 dewatering wells and the conversion of 15 piezometers to dewatering wells was sufficient to meet the objectives set forth in Paragraph 204 of this Complaint.

207. WMATA concealed from KiSKA-Kajima the fact that its geotechnical consultants designed and submitted to WMATA a dewatering system for this Project which depicted approximately 225 dewatering wells.

208. WMATA concealed from KiSKA-Kajima that WMATA failed to follow sound engineering practices and the advice of its consultants in developing the design of the dewatering system.

209. WMATA concealed from KiSKA-Kajima that WMATA failed to perform a comprehensive pumping test program in designing the dewatering system.

210. WMATA concealed from KiSKA-Kajima that the dewatering system designed by WMATA was based upon limited subsurface data which was not representative of the ground conditions throughout most of the alignment.

211. WMATA represented to KiSKA-Kajima that 110,000 cf of chemical grout was the estimated quantity to adequately grout the tunnel.

212. WMATA concealed from KiSKA-Kajima that WMATA's consultants estimated that approximately 400,000 cf of chemical grout would be necessary based upon the anticipated subsurface conditions.

213. WMATA concealed from KiSKA-Kajima material facts regarding WMATA's geotechnical consultants' proposed method and location of chemical grouting.

214. WMATA represented to KiSKA-Kajima that grouting could be efficiently performed from the surface.

215. WMATA concealed from KiSKA-Kajima that WMATA's geotechnical consultants recommended that the grouting be performed from the face of the tunnel.

216. WMATA concealed from KiSKA-Kajima the existence and/or content of GZA's three TARs, which contain material representations concerning the subsurface conditions, tunneling

alternatives, and recommended construction methodologies for the Project.

217. The representations and concealments identified in Paragraphs 191-216 of this Complaint were material to the Contract.

218. The representations and concealments identified in Paragraphs 191-216 of this Complaint were false, fraudulent and misleading.

219. WMATA knowingly, intentionally, purposefully and deliberately made the representations and concealments identified in Paragraphs 191-216 of this Complaint as an inducement for KiSKA-Kajima to enter into the Contract.

220. WMATA intended that KiSKA-Kajima rely on the representations and concealments identified in Paragraphs 191-216 of this Complaint.

221. KiSKA-Kajima justifiably relied on WMATA's representations and concealments identified in Paragraphs 191-216 of this Complaint in bidding on and agreeing to the terms of the Contract.

222. But for WMATA's misrepresentations and concealments, which WMATA knew or should have known would be relied on by KiSKA-Kajima, KiSKA-Kajima would have declined to enter into the Contract for its stated price and terms.

223. In reliance upon WMATA's misrepresentations and concealments, KiSKA-Kajima was fraudulently induced to enter into the Contract with WMATA for its stated price and terms.

224. KiSKA-Kajima relied to its detriment upon the false representations and concealments of material facts made by WMATA in determining the amount of its bid, in submitting its bid, in entering into the Contract and in performing the Contract.

225. Prior to and at the time of entering into the Contract, KiSKA-Kajima had no knowledge of the falsity of WMATA's representations and concealments.

226. As a direct and proximate result of WMATA's fraudulent inducement of the Contract, KiSKA-Kajima has suffered damages in the amount of at least $44,000,000.00, the exact amount to be determined and proven at trial.

WHEREFORE, KiSKA-Kajima demands judgment against WMATA for all of its actual losses, including all costs and expenses associated with the Contract, in the amount of at least $44,000,000.00, the exact amount to be determined and proven at trial, plus prejudgment and post-judgment interest, reasonable attorneys' fees, costs, punitive damages, and such other and further relief as the Court deems appropriate.

COUNT II

NEGLIGENT MISREPRESENTATION

227. Paragraphs 1 through 216 of this Complaint are hereby realleged and incorporated by reference as if fully repeated herein.

228. The representations and concealments identified in Paragraphs 191-216 of this Complaint were material to the Contract.

229. The representations and concealments identified in Paragraphs 191-216 of this Complaint were false and misleading.

230. WMATA negligently made the representations and concealments identified in Paragraphs 191-216 of this Complaint.

231. WMATA intended or should have recognized that KiSKA-Kajima would rely on the representations and concealments identified in Paragraphs 191-216 of this Complaint.

232. KiSKA-Kajima justifiably relied on WMATA's representations and concealments identified in Paragraphs 191-216 of this Complaint in bidding on and agreeing to the terms of the Contract.

233. But for WMATA's misrepresentations and concealments, which WMATA knew or should have known would be relied on by KiSKA-Kajima, KiSKA-Kajima would have declined to enter into the Contract for its stated price and terms.

234. KiSKA-Kajima relied to its detriment upon the negligent representations and concealments of material facts made by WMATA in determining the amount of its bid, in submitting its bid, in entering into the Contract and in performing the Contract.

235. Prior to and at the time of entering into the Contract, KiSKA-Kajima had no knowledge of the falsity of WMATA's representations and concealments.

236. As a direct and proximate result of WMATA's negligent misrepresentations and concealments, KiSKA-Kajima has suffered damages in the amount of at least $44,000,000.00, the exact amount to be determined and proven at trial.

WHEREFORE, KiSKA-Kajima demands judgment against WMATA for all of its actual losses, including all costs and expenses associated with the Contract in the amount of at least $44,000,000.00, the exact amount to be determined and proven at trial, plus prejudgment and post-judgment interest, reasonable attorneys' fees, costs, and such other and further relief as the Court deems appropriate.

COUNT III

UNILATERAL MISTAKE

237. Paragraphs 1 through 189 of this Complaint are hereby realleged and incorporated by reference as if fully repeated herein.

238. Prior to, and at the time of contracting, WMATA expressly and impliedly warranted to KiSKA-Kajima that if KiSKA-Kajima adhered to the information in the IFB and Contract plans and specifications, KiSKA-Kajima would be able to complete the work in an efficient and safe manner, and that such work would be acceptable to WMATA.

239. WMATA's express and implied warranty of the accuracy of the IFB and Contract plans and specifications served as the basis for KiSKA-Kajima's bid and the Contract.

240. At the time of contracting, KiSKA-Kajima was laboring under a material error of fact regarding the accuracy of WMATA's IFB and Contract Plans and specifications.

241. KiSKA-Kajima's error of fact occurred as a direct result of WMATA's misrepresentations and concealments of material information set forth in Paragraphs 191-216 of this Complaint which are incorporated by reference herein.

242. At the time of contracting, WMATA knew or should have known that KiSKA-Kajima was laboring under an error of fact regarding the accuracy of the IFB and the Contract plans and specifications.

243. As a direct result of KiSKA-Kajima's error of material fact regarding the accuracy of the IFB and the Contract plans and specifications, KiSKA-Kajima was mistaken in estimating its performance costs and duration prior to executing the Contract.

244. KiSKA-Kajima's mistake in its estimate of performance costs and duration caused KiSKA-Kajima to agree to a Contract price and duration based upon erroneous information.

245. As a direct result, KiSKA-Kajima suffered damages in the amount of at least $44,000,000.00, the exact amount to be determined and proven at trial.

WHEREFORE, KiSKA-Kajima demands judgment against WMATA for all of its actual losses, including all costs and expenses associated with the Contract, in the amount of at least $44,000,000.00, the exact amount to be determined and proven at trial, plus prejudgment and post-judgment interest, reasonable attorneys' fees, costs, and such other and further relief as the Court deems appropriate.

COUNT IV

MATERIAL BREACH OF CONTRACT

246. Paragraphs 1 through 189 of this Complaint are hereby realleged and incorporated by reference as if fully repeated herein.

247. By issuing the IFB, WMATA expressly and impliedly warranted that all Contract plans, specifications and other information contained therein were accurate, that the successful bidder would have ready access to the various segments of the worksite, that WMATA would cooperate with the successful bidder so as not to hinder, interfere with, or obstruct the performance of the Contract, and that the successful bidder would be able to schedule and perform the work in such a manner as to most efficiently utilize its resources.

248. WMATA materially breached the Contract, including express and implied warranties, in at least the following ways:

a. WMATA failed to disclose necessary and vital information to KiSKA-Kajima relating to the performance and safety of the work to be performed;

b. The Contract plans and specifications and directed construction methods prepared by WMATA were defective, misleading, incomplete and unfit for their intended purpose;

c. WMATA breached its duty to cooperate with KiSKA-Kajima and not hinder or interfere with KiSKA-Kajima's performance;

d. WMATA failed and refused to grant time extensions for excusable and/or compensable delays encountered by KiSKA-Kajima;

e. WMATA directed that extra work beyond the scope of the Contract be performed and has failed and/or refused to pay for such extra work;

f. WMATA failed and refused to administer the Contract in accordance with its terms and with good faith and fair dealing;

g. WMATA failed to coordinate the Project with the numerous Washington, D.C. utility companies and permit-granting agencies;

h. WMATA failed to coordinate the work of its other contractors, including Blake Construction;

i. WMATA failed to obtain necessary permits for construction in a timely manner;

j. WMATA failed and refused to review and approve shop drawings in a timely manner;

k. WMATA failed to provide timely and complete access to the jobsite;

l. WMATA directed the acceleration of the work without compensating KiSKA-Kajima;

m. WMATA arbitrarily and unreasonably directed pervasive changes to the Contract which constituted a cardinal change.

249. As a direct result of WMATA's material breaches of contract, KiSKA-Kajima has suffered damages in the amount of at least $38,000,000.00, the exact amount to be determined and proven at trial.

250. KiSKA-Kajima has performed all conditions precedent to the bringing of this breach of contract action or such conditions have been waived or excused by action of WMATA.

WHEREFORE, KiSKA-Kajima demands judgment against WMATA for all of its damages, including costs, expenses and reasonable profit, in the amount of at least $38,000,000.00, the exact amount to be determined and proven at trial, plus prejudgment and post-judgment interest, reasonable attorneys' fees, costs, and such other and further relief as the Court deems appropriate.

COUNT V

WORK OUTSIDE THE SCOPE OF THE CONTRACT - QUANTUM MERUIT

251. Paragraphs 1 through 250 of this Complaint are hereby realleged and incorporated by reference as if fully repeated herein.

252. As a result of WMATA's acts and omissions described in Paragraphs 1-250 of this Complaint, WMATA caused KiSKA-Kajima to perform substantial work outside the scope of the Contract.

253. KiSKA-Kajima performed this additional scope of work on the Project, for which additional scope KiSKA-Kajima has not been compensated by WMATA.

254. The additional scope of work was performed by KiSKA-Kajima at the direction of WMATA, has benefited WMATA, and WMATA has not paid for such work.

255. The reasonable value of the work which KiSKA-Kajima performed for WMATA outside the scope of the Contract is at least $38,000,000.00.

256. KiSKA-Kajima is entitled to payment for the scope of work performed in addition to that required by the Contract in an amount in excess of $38,000,000.00, the exact amount to be determined and proven at trial.

257. KiSKA-Kajima has performed all conditions precedent to the bringing of this cause of action or such conditions have been waived or excused by WMATA.

WHEREFORE, KiSKA-Kajima demands judgment against WMATA in the amount of at least $38,000,000.00, *in quantum meruit*, the exact amount to be determined and proven at trial, plus prejudgment and post- interest, reasonable attorneys' fees, costs, and such other and further relief as the Court deems appropriate.

KISKA-KAJIMA HEREBY DEMANDS A TRIAL BY JURY.

Respectfully submitted,

WATT, TIEDER & HOFFAR, L.L.P.

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No. 03-66

IN THE

Supreme Court of the United States

KISKA CONSTRUCTION CORPORATION—U.S.A. and
KAJIMA ENGINEERNG AND CONSTRUCTION, INC.,
PARTNERS IN KISKA-KAJIMA, A JOINT VENTURE,
Petitioners,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION AND BRIEF OF *AMICUS CURIAE* THE GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC. IN SUPPORT OF PETITION FOR CERTIORARI

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE A BRIEF IN SUPPORT OF PETITIONER

Petitioner has consented to the filing of this brief by letter dated July 29, 2003. Respondent, however, has refused to grant consent. Pursuant to Supreme Court Rule 37.2(b), therefore, *amicus curiae* The General Contractors Association of New York, Inc. ("GCA") respectfully moves for leave to file this brief in support of petitioner in the above-captioned case.

GCA is a construction industry not-for-profit corporation that for 94 years has promoted procurement policies, regulations and legislation that foster free and fair competitive bidding practices for public construction projects, which serve the public interest, protect the public fisc and prevent

corruption. Toward that end it has regularly dealt with legislative, administrative and executive representatives at the local, state and federal levels to support legislation, regulations and case law that encourage full disclosure in the bidding process. GCA and its members have a direct and immediate interest in cases such as this that threaten to impede fair bidding procedures for public construction projects.

GCA believes that the broad, industry perspective presented in its accompanying brief as *amicus curiae* will be of distinct assistance to the Court in its consideration of the petition for a writ of certiorari.

Accordingly, *amicus* requests leave to file the attached brief.

Respectfully submitted,

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August 8, 2003

QUESTIONS PRESENTED

I

Have lower courts, and in particular the D.C. Circuit here, overstepped their authority and committed error, by unilaterally and belatedly reinterpreting the plain English of the WMATA Compact so as to convert its governmental/ proprietary dichotomy into a discretionary/ministerial divide for convenience of application?

II

Assuming that a discretionary/ministerial standard is applicable under the WMATA Compact, is there a public policy that sanctions discretion to commit a fraud?

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The General Contractors Association of New York, Inc. ("GCA") is a not-for-profit organization founded in 1909.[1]

[1] Pursuant to Supreme Court Rule 37.6 *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* or its members made a monetary contribution to the preparation or submission of this brief. Although petitioner has consented to the filing of this brief, respondent has not, and the amicus has therefore included a motion for leave to file pursuant to Supreme Court Rule 37.2(b).

Its membership is composed of contractors engaged in heavy construction, such as the building of bridges, tunnels, highways, transit facilities, sewage treatment plans and other large public construction projects. GCA's members collectively undertake many billions of dollars worth of heavy construction work each year.

GCA's members secure their work principally through competitive public bidding and have a vital interest in knowing that the plans, specifications, borings and other documents made available to them by public owners prior to a bid letting are as complete and accurate as possible and that any superior knowledge available to the public owner is not withheld. Although sealed competitive bidding involves substantial risk, which GCA's members and other contractors are aware of and assume, it is not intended to be gambling. The strict adherence by the Washington Metropolitan Transit Authority ("WMATA") to a standard of full and fair disclosure is infinitely more in the public interest than obtaining a pecuniary benefit in an individual case by engaging in a practice that does violence to the spirit and purpose of competitive bidding.

GCA and its members believe the issues in this case to be significant to the construction industry and, accordingly, submit this brief in support of the petition for a writ of certiorari.

INTRODUCTION

While *amicus* joins in the arguments presented by petitioner, it seeks by this brief to supplement those arguments by bringing to the court's attention the construction industry's broad perspective and its concern over the adverse consequences that are likely to result from the D.C. Circuit's improper holding.

This case has now fully affirmed as the law that WMATA is immune on jurisdictional sovereign immunity grounds

from any claim for damages arising out of its tortious misrepresentation in the inducement of a contract. Unlike the Federal Tort Claims Act ("FTCA"), which in Title 28 § 2680(h) contains a misrepresentation exception to the general waiver of sovereign immunity, the WMATA Compact contains no such exception. Yet, the D.C. Circuit, while nominally accepting the complaint's allegations of misrepresentation as true, as it had to, nonetheless enveloped its dismissal in the cocoon of "discretion" and neglected to deal directly with the central issue of whether there exists a public policy to shield WMATA's fraud.

The expansion of the discretionary exception in FTCA cases, which has occurred mostly in personal injury and wrongful death claims resulting from allegations of negligence, should not be extended to WMATA, either by unwarranted revision of the Compact's language or by countenancing tortious misrepresentation through reasoning that uses the FTCA as an analogue.

Absent review and reversal by the Supreme Court, the holding in this case will compel contractors to inflate their bids to WMATA, at the public's expense, by including a contingency amount designed to protect against the possibility that significant information is being misrepresented or withheld from them. Analogously, the cases have long recognized that changed conditions clauses are added to government contracts to take the gambling aspect out of public bidding and to prevent both windfalls and disasters. See *e.g.*, *Foster Construction C.A. and Williams Brothers Company v. United States*, 435 F.2d 873, 887, 193 Ct. Cl. 587 (1970) and *Kaiser Industries Corp. v. United States*, 340 F.2d 322, 329, 169 Ct. Cl. 310, 323 (1965).

ARGUMENT

I. THE COURTS ARE WITHOUT AUTHORITY TO CHANGE THE SOVEREIGN IMMUNITY STANDARD IN THE WMATA COMPACT

In 1966, 20 years after the enactment of the discretionary function exception in the FTCA; 13 years after this court's first explication of that exception in *Dalehite v. United States*, 346 U.S. 15 (1953); and 11 years after this court took note in *Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955) of the "nongovernmental"—"governmental" quagmire that long plagued the law of municipal corporations, Congress adopted the WMATA Compact for the District of Columbia, Maryland and Virginia and in Section 80 thereof waived sovereign immunity based on acts "committed in the conduct of any proprietary function."[2]

In the cases that followed the adoption of the Compact, the courts concerned themselves with deciding whether the acts that gave rise to the causes of action occurred in the performance of a proprietary or a governmental function. See *e.g.*, *Martin v. WMATA*, 667 F.2d 435 (4th Cir. 1981) and *Morris v. WMATA*, 781 F.2d 218 (D.C. Cir. 1986). In *Morris*, Judge Bork commented in footnote 5 that the terms of a compact enacted after the establishment of the instrumentality/political subdivision test would be highly probative evidence of intent to confer immunity or not because those words had become terms of art. By like reasoning, the adoption of the WMATA compact 20 years after the enactment of the FTCA yet waiving immunity from tort claims arising out of a "proprietary function" is highly probative of Congress' intent.[3]

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[2] The WMATA Compact is codified in D.C. Code § 9-1107.01, Maryland Code, Trans. § 10-204(80), Virginia Code § 56-529, 530.

[3] By an *en banc* decision in *Spencer v. General Hospital*, 425 F.2d 479, 484 (D.C. Cir. 1969), the court declared "a formal interment of the

History amply demonstrates that building and running railroads has always been a proprietary function through which great personal fortunes were made. The fact that a government entity undertakes to create and operate a railroad does not change the nature of the activity, nor make it a core governmental function akin to police, sanitation and military services. One case has held that the design and planning of a transportation system falls into the governmental category (*McKethean v. WMATA*, 588 A.2d 708 [D.C. Cir. 1991]), while a second has held that the provision of mass transportation under the Compact is a proprietary function (*QASIM v. WMATA*, 455 A.2d 904 [D.C. Cir. 1983], *cert. denied* 461 U.S. 929 [1983]). A third invoked the distinction that the design of the metrorail system was governmental and its operation proprietary. *Beatty v. WMATA*, 860 F.2d 1117 (D.C. Cir. 1988). But, common sense compels the conclusion that there is no difference between the two classifications, and that the creature is either fish or fowl, not a little of each. Even in the context of FTCA litigation, where the discretionary function exception concededly applies, the Supreme Court held in *United States v. Gaubert*, 499 U.S. 315 (1991) that the Court of Appeals had improperly perpetuated a nonexistent dichotomy between discretionary function and operational activity.

The difficulty of discerning when an activity is governmental or proprietary does not authorize the courts to change the plain language written into the Compact by Congress. Yet, that is precisely what the D.C. Circuit did for the first time in *Sanders v. WMATA*, 819 F.2d 1151 (D.C. Cir. 1987), 21 years after the adoption of the Compact. Moreover, it did so despite its recognition that the legislative history of the

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`governmental-proprietary' test of immunity" and stated that "we flout no visible purpose or policy of Congress but, rather, only bury one of our own offspring ___." Here, on the contrary, Congress has expressly enunciated its policy.

Compact sheds no light on the meaning or scope of the proprietary function; and that the FTCA's standard and the Compact's standard are distinct and not necessarily coterminous, citing the *Restatement (Second of Torts)* § 895 C comments e and g and *Prosser and Keaton on Torts* 1953 (5th ed. 1983). *Sanders* was a case involving employees who were discharged in connection with WMATA's general policy of testing for drugs or alcohol immediately after an on-the-job accident or incident and might well have fallen into the area of governmental function based on public safety. Whether that is so or not, the case itself surely should not have been the springboard to propel so radical a change of prior decisions interpreting the Compact during the course of the preceding two decades.

The Fourth Circuit, over a vehement dissent, recently joined the D.C. Circuit's conclusion in *Sanders* that the discretionary function exception of the FTCA should be read into the WMATA Compact. *Smith v. WMATA*, 290 F.3d 201, *cert. denied* 123 S.Ct. 387, Ct. 387 (4th Cir. 2002). In *Sanders*, the court wrote, in unsure language, "[T]he Compact *seems to us* to have accepted the *Dalehite* conception we have just outlined" (emphasis supplied). 819 F.2d at 1155. The *Smith* court, however, changed that to an unqualified statement that "The Compact `accepted the *Dalehite* conception'. . ." 290 F.3d at 207. More significant, however, is that the rationale that the Compact came into existence 13 years after *Dalehite* and therefore should be said to have adopted *Dalehite* fails to withstand scrutiny. To begin with that analysis turns the matter on its head for the reasons set out at the start of this point. Second, as Judge Michael pointed out in his dissent in *Smith*, the fact that the WMATA Compact implicates federal law does not mean that the governmental function in the Compact should track the discretionary function in the FTCA. 290 F.3d at 220.

The wholesale incorporation into the WMATA Compact of the FTCA's discretionary function exception is no more legitimate than would be the incorporation of the FTCA's misrepresentation exception. Congress didn't put them into the Compact and, consequently, they don't belong.

II. EVEN ASSUMING THE APPLICABILITY OF A DISCRETIONARY/MINISTERIAL STANDARD UNDER THE WMATA COMPACT, THERE CAN BE NO PUBLIC POLICY SANCTIONING DISCRETION TO COMMIT A FRAUD

The complaint in this action alleges that WMATA knowingly, intentionally, purposefully, deliberately and negligently made false representations and concealments of material information (which it identifies with particularity) to induce petitioners to submit a low bid for the Green Line 14th Street Tunnels; that petitioners without knowledge of the falsity relied on those representations; and that as a result thereof they suffered damages in the performance of the contract in the sum of at least $44,000,000 over and above the original contract price of $42,905,000. App. 32a-33a, 63a-68a.

Those allegations of fraud, misrepresentation and concealment must be accepted as true on a motion to dismiss, and petitioners are not required to prove them at this time. *Berkovitz v. United States*, 486 U.S, 531 (1988).[4] The D.C. Circuit here made a passing reference to acceptance of the dismissed factual allegations of the complaint as true

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[4] *Berkovitz* also demonstrates the difference in standards between the Compact and the FTCA. *Berkovitz* put to rest the government's argument that there are "uniquely governmental functions" that preclude liability against the government under the FTCA. However, quintessential governmental activity is still very much a standard for invoking immunity from tort under the WMATA Compact. See *e.g.*, *Dant v. District of Columbia*, 829 F.2d 69 (D.C. Cir. 1987); *Burkhart v. WMATA*, 112 F.3d 1207 (D.C. Cir. 1997); opinion below, FN8 App. 10a.

(App. 7a), and then proceeded to draw its own contrary conclusions. For example, there is certainly nothing in the record to support the court's assumption that WMATA was exercising discretion in not releasing "unreliable or mistaken reports." App. 15a. The D.C. Circuit conceded that "WMATA may not withhold all unfavorable information from contractors", but neglected to elucidate by example or to explain why not, except to say that few contractors would then be willing to submit bids to WMATA. App. 15a.

There appears to be no case prior to this one in which fraud in the inducement of a contract by WMATA has been subjected to sovereign immunity scrutiny. In response to petitioners' contention that the FTCA contains a "misrepresentation" exception and the WMATA Compact does not, the D.C. Circuit merely stated, without analysis, that it had previously upheld the dismissal of fraud and misrepresentation claims against WMATA, citing *Beebe v. WMATA*, 129 F.3d at 1286, 1288. App. 11a-12a, FN 11. An examination of *Beebe* shows that there is little or nothing in it to support the broad meaning imputed to it by the D.C. Circuit in this case. Beebe was a disappointed WMATA employee who, failing to get the higher job he wanted, sued WMATA and two of his co-employees and filed a scattershot complaint alleging ten causes of action, including tort claims for fraud, intentional infliction of emotional harm, gross negligence, defamation and wrongful interference with his employment relationship. Applying federal common law, the *Beebe* court dismissed all of the claims under sovereign immunity as having arisen from policy decisions during the reorganization of a WMATA department. The *Beebe* decision recognized that not all intentional or malicious torts committed in the course of employment are immunized, and provided as an example the use of physical force. 129 F.3d at 1289. It is hard to see how the unauthorized use of physical force differs in legal theory from the unauthorized commission of a fraud. The D.C. court here acknowledged

that the covenant of good faith and fair dealing undoubtedly constrained WMATA's behavior in the context of its contractual relationships, but not in tort. But, it did not arrive at that conclusion by legal analysis of the difference between the two, but rather by basing its conclusion on the circular reasoning of sovereign immunity. App. 12a.

Even assuming that the discretionary function exception may be read into the WMATA Compact by utilitarian reasoning, it is essential to the analysis in this case that both prongs set out in *Berkovitz* and *Gaubert* be properly understood and applied. When addressing the first prong, the question to be answered is whether the conduct is susceptible to policy judgment, for which purpose the courts look to the nature of the conduct rather than the status of the actor. *United States v. Varig Airlines*, 467 U.S. 797, 813 (1984). Absent the violation of a mandatory regulation, which necessarily negates judgment and discretion, almost all conduct may be said to involve the exercise of discretion.[5] It is the second prong that is of greater interest and controlling here, assuming the applicability of the standard to WMATA. Here, the question to be answered is whether the judgment is of the kind that the discretionary function exception was designed to shield. The purpose of the exception is said to be to "prevent judicial `second guessing' of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort." *Varig Airlines*, 467 U.S. at 814. When properly construed,

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[5] The decision in *Cope v. Scott*, 45 F.3d 445, 449 (D.C. Cir. 1995) comments on the fact that when government counsel was pressed at oral argument to provide even one example of a discretionary function that would not be exempt for failure to implement policy concerns, he was unable to come up with an answer other than the time worn example of the negligent driver of a motor vehicle.

the exception "protects only governmental actions and decisions based on consideration of public policy." *Berkovitz*, 486 U.S. at 537.

The direct question then, which the court below declined to deal with, is whether there exists a public policy to exculpate WMATA from responsibility for its own fraud. Surely not. Because it is apodictic that neither social nor political policy favors the perpetration of fraud in the inducement of a contract, may economic considerations be taken into account on the ground that budgetary constraints necessarily control all administrative actions? The answer is twofold. First, the Supreme Court has never classified budgetary considerations to be sufficient to invoke the discretionary function exception. Although an agency must make decisions on where to spend its limited funds, that does not then, standing alone, become a decision based on considerations of public policy. The D.C. Circuit itself has stated that the mere presence of choice. even if it involves whether money should be spent, does not trigger the exception. *Cope v. Scott*, 45 F.3d 445, 449 (1995). Second, there is a large difference between allocating limited financial resources and the creation of a policy to mislead bidders to save money.

If the test of being susceptible to policy analysis as set out in *Gaubert*, 499 U.S. at 324-5 is so broadly read as to allow a conclusive presumption (*i.e.*, rule of law) that a discretionary function has been performed, then the concept of waiver of immunity will indeed be swallowed whole by the discretionary exception. See the dissent in *Smith v. WMATA*, 290 F.3d 201, 212-223 (2002).

CONCLUSION

For the reasons set forth above, and for the reasons enunciated in petitioners' application and brief, this court should grant a writ of certiorari.

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August 8, 2003

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No. 03-66

IN THE

Supreme Court of the United States

KISKA CONSTRUCTION CORPORATION – U.S.A. AND KAJIMA ENGINEERING AND CONSTRUCTION, INC., PARTNERS IN KISKA-KAJIMA, A JOINT VENTURE,

Petitioners,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether after a five-week trial on its contract claims, Petitioner should have a second opportunity to litigate the same factual allegations in tort despite WMATA's sovereign immunity from such tort claims.

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STATEMENT OF THE CASE

Respondent Washington Metropolitan Area Transit Authority ("WMATA") is an agency and instrumentality of Maryland, Virginia and the District of Columbia, authorized by Congress. *See* Pub. L. No. 89-774, 80 Stat. 1324 (1966). Since its creation in 1966, WMATA has designed and operated a mass transit system for the public. During this time, it has awarded contracts to construct portions of the public subway system. On occasion, disputes have arisen under these contracts. As provided in the contracts, the contractors have the right to bring disputes to a board of contract appeals. Less frequently, contractors have asserted breach of contract claims to district courts. In this case, Petitioner asserted breach of contract claims and a unilateral mistake claim against WMATA based on alleged concealment of material information. Petitioner specifically asserted breach of contract claims based on failure to disclose superior knowledge and breach of the duty of good faith and fair dealing. Those claims were presented to a jury during a five-week trial, and the jury entered judgment against Petitioner and in favor of WMATA.

The district court dismissed Petitioner's tort claims, which were predicated on the same facts as were its contract claims. Petitioner complains that it was improperly deprived of the opportunity to argue that WMATA's alleged concealment of material information constituted fraud and misrepresentation, even though it was permitted to argue that that act was a breach of the obligation to disclose superior knowledge and a breach of the duty of good faith and fair dealing.

Obviously, Petitioner had a remedy for its claims of concealment and exercised that remedy.[1] Petitioner has no

1. The trial judge instructed the jury to find a breach of contract if the specifications were not adequate or complete or if WMATA (Cont'd)

right to a second bite at the apple. The district court and D.C. Circuit each properly applied WMATA's Compact, which expressly provides that WMATA "shall not be liable for any torts occurring in the performance of a governmental function." *See* D.C. Code § 9-1107.01(80). In so doing, both courts followed the law on sovereign immunity for WMATA that Petitioner admits has been settled since the 1987 decision in *Sanders v. WMATA*, 819 F.2d 1151 (D.C. Cir. 1987). Pet. at 14. In so doing, both courts used the discretionary/ ministerial distinction of the Federal Tort Claims Act ("FTCA") as a tool in determining whether the challenged activity was governmental.[2] Both courts determined that WMATA's decision not to include certain documents in bid packages[3] provided to prospective contractors was a governmental function that could be the subject of an action for breach of contract but could not give rise to tort liability.

(Cont'd)
failed to disclose vital information. D.C. Cir. J.A. at JA524; 529-33. The trial judge also instructed the jury to find a unilateral mistake if WMATA knew that Petitioner bid without access to vital information that WMATA had. D.C. Cir. J.A. at JA536-37. Clearly, the jury was not persuaded by Petitioner's assertions of wrongdoing.

2. And, despite its challenge now, Petitioner embraced the use of that distinction in its brief to the D.C. Circuit. *See* D.C. Cir. Br. for Appellants at 20-26.

3. The record before the trial court showed that the GZA GeoEnvironmental, Inc. reports that Petitioner alleged had been concealed were draft reports, had been superceded and had been made available for review by Petitioner. *See* D.C. Cir. J.A. at JA585 and JA587; JA492-93; *see also* JA506-07 and JA509.

The D.C. Circuit correctly decided the case. Petitioner already had its day in court. There is no basis for the Supreme Court to revisit the law of sovereign immunity for WMATA. That law has very limited application, has been settled for over 15 years and has been applied consistently by the federal circuits.

REASONS FOR DENYING THE PETITION

In this case, the Petitioner had a five-week jury trial on its claims of unilateral mistake and material breach of contract. And, although Petitioner's tort claims were dismissed before trial, the district court expressly permitted Petitioner to introduce the "same set of facts" that Petitioner alleged supported its claims of fraudulent misrepresentation and negligent misrepresentation. *See* Pet. App. 29a. Indeed, every factual allegation that Petitioner argued supported its misrepresentation claims was incorporated by reference into the unilateral mistake count that was heard by the jury. *See* Pet. App. 68a at ¶ 237 and ¶ 241; *see also* Pet. App. 70a. Also, in his closing argument, counsel for Petitioner argued that Respondent WMATA had "misrepresented and lied" and engaged in "systematic and intentional lies and concealments of vital information." *See* D.C. Cir. J.A. at JA559 and JA540. The jury rejected Petitioner's claims and judgment was entered for WMATA. The D.C. Circuit affirmed that judgment.

Despite the above, Petitioner asserts that it was "denied its day in court on tort claims under an immunity analysis . . . ." Pet. at 19. Specifically, Petitioner argues that in finding that WMATA had sovereign immunity from the tort claims, the D.C. Circuit applied the wrong standard. Petitioner also argues that the court's decision gives WMATA "discretion" to commit fraud by concealing material information from its contractors.

The Petition should be denied because the factual allegations of fraud, misrepresentation and concealment were heard by the jury as an alleged breach of contract for WMATA's purported failure to disclose superior knowledge and as part of Petitioner's unilateral mistake claim. *See* Pet. App. 70a at ¶ 248.a; Pet. App. 69a at ¶ 241. Petitioner had its day in court on those claims and lost. There has been no miscarriage of justice. The Petition also should be denied because there is no split in circuits and the case involves a unique and unusual issue of law that only has applicability to solicitations let by WMATA. In addition, although the district court properly utilized the discretionary/ministerial distinction (the alleged wrong standard) as an aid in applying the governmental/proprietary test, Petitioner did not argue to the D.C. Circuit that the discretionary/ ministerial test was the wrong standard. In fact, at the D.C. Circuit, Petitioner argued that its tort claims should not have been dismissed because they alleged conduct "beyond the scope of the 'discretionary function' exception to sovereign immunity . . . ." D.C. Cir. Br. for Appellants ("Appellant Br.") at 26. And, Petitioner never even cited *Sanders v. WMATA*, 819 F. 2d 1151 (D.C. Cir. 1987) to the D.C. Circuit — even though it is that case that Petitioner now attacks and asks this Court to reverse. Respondent submits that the Court should not entertain an issue that Petitioner could have presented below but failed to raise.

The D.C. Circuit's ruling was proper in all respects and Respondent respectfully urges this Honorable Court to deny the petition for writ of *certiorari*.

I. THE PETITION'S ATTACK ON THE USE OF THE DISCRETIONARY/MINISTERIAL DISTINCTION WAS NOT PRESENTED TO THE D.C. CIRCUIT

In its decision dismissing Petitioner's tort claims on sovereign immunity grounds, the district court noted that when a "quintessential" governmental function is not at issue, "the D.C. Circuit draws upon the Federal Tort Claims Act's dichotomy between 'discretionary' and 'ministerial' acts" to determine whether a challenged activity is governmental. Pet. App. 26a. The district court then applied the discretionary/ministerial test to Petitioner's tort claims and found that application of that test required dismissal of Petitioner's tort claims. Pet. App. 26a-28a. Despite that, at the circuit court level, Petitioner did not argue that the district court had improperly utilized the discretionary/ministerial test or had replaced the government/proprietary distinction with the discretionary/ministerial distinction. Instead, Petitioner embraced the distinction in the FTCA (Appellant Br. at 20) and argued that "because KiSKA's complaint alleges tortious conduct by WMATA beyond the scope of the 'discretionary function' exception to sovereign immunity, the district court erred by dismissing those tort claims on the pleadings." Appellant Br. at 19-26. Because Petitioner did not present the first question in its Petition to the D.C. Circuit, it should not be permitted to first raise this issue before the Supreme Court. *See Lawn v. United States*, 355 U.S. 339, 362 n.16 (1958) ("Only in exceptional cases will this Court review a question not raised in the court below.") (citing *Duignan v. United States*, 274 U.S. 195, 200 (1927)); *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 330 (1967); *United States v. Lovasco*, 431 U.S. 783, 788 (1977); *see also United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001) (declining to hear "new substantive

arguments attacking, rather than defending, the judgment when" arguments were not presented below).[4]

II. THE PETITION ADMITS THAT THERE IS NO SPLIT IN THE CIRCUITS

Petitioner asks the Court to review the D.C. Circuit's alleged improper use of the discretionary/ministerial test to determine whether the challenged activity was governmental, and thereby subject to WMATA's sovereign immunity. However, Petitioner concedes that there is no split in the federal circuits regarding the use of that standard. The Petition admits that both the Fourth Circuit and the D.C. Circuit agree that WMATA's immunity from tort claims should be analyzed in light of the legal principles of the FTCA. Pet. at 18. There is no split in circuits that would justify Supreme Court review.[5]

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4. Moreover, contrary to Petitioner's assertion, the D.C. Circuit did not replace the governmental/proprietary distinction with the discretionary/ministerial test. Instead, the discretionary/ministerial test was properly used as an aid to determine whether WMATA's project planning activities were governmental. *See, e.g., Burkhart v. WMATA*, 112 F.3d 1207, 1216 (D.C. Cir. 1997) (noting that the court has "developed two alternative tests for identifying 'governmental' functions under the WMATA Compact.")

5. The D.C. Court of Appeals also has adopted the use of discretionary/ministerial distinction from the FTCA for purposes of analyzing whether the challenged activity is governmental and whether WMATA enjoys sovereign immunity for challenged actions. *See* Pet. at 19 n.3 (citing *McKethean v. WMATA*, 588 A.2d 708, 712-13 (D.C. 1991)).

III. THE PETITION DOES NOT PRESENT AN IMPORTANT ISSUE AND THE CASE WAS CORRECTLY DECIDED

Petitioner argues that by holding WMATA has sovereign immunity from claims that it tortiously concealed material information, the D.C. Circuit gave WMATA discretion to commit fraud. The D.C. Circuit did no such thing. The court only found that dismissal of Petitioner's tort claims was proper. The court expressly found that "the covenant of good faith and fair dealing undoubtedly constrains WMATA's behavior within the context of its contractual relationships . . . ." Pet. App. 12a. Moreover, as this case illustrates, a remedy is available in contract for any contractor that alleges failure to disclose superior knowledge or breach of the duty of good faith and fair dealing. *See* Pet. App. 29a; *see also* Pet. at 22 and cases cited in the first full paragraph therein. As acknowledged by Petitioner, those cases all were contract actions brought for breach of the duty to fully disclose facts. *See* Pet. at 22. Thus, the Petition does not present a case where WMATA is free to conceal material information. A party alleging concealment has a clear remedy for that claim.[6]

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6. Petitioner also cited cases applying New Jersey, Michigan and Missouri law to argue that certain states recognize a *tort* duty not to conceal and/or misrepresent material information. Pet. at 22 n.4. Petitioner's reliance on the cited cases is misplaced. First, the cited cases do not address the extent of WMATA's sovereign immunity. Moreover, *P.T.&L. Constr. Co. v. New Jersey*, 531 A.2d 1330 (N.J. 1987) states that the contractor "brought action against the DOT *for breach of contract*." *Id.* at 1330 (emphasis added). *Earl L. Reamer Co. v. City of Swarz Creek*, 256 N.W.2d 447, 450 (Mich. Ct. App. 1977) does not indicate whether the cause of action sounded

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Similarly, the Petition presents an unusual and unique issue limited to a single, local governmental entity — WMATA. Interpretation of the WMATA Compact has no applicability to federal government contracts, state government contracts, local government contracts or commercial contracts.

In any event, the district court and D.C. Circuit correctly decided the case. As a practical matter, when WMATA prepares a solicitation for a large construction contract, it must review tens of thousands of pages of information and determine what to include in the solicitation package. The contents of WMATA's bid packages are not specifically prescribed by any statute, regulation or policy. *See* Pet. App 12a and 27a. Thus, discretion must be applied as to what to include in and exclude from such packages. And, such discretionary decisions are "susceptible to policy judgment" requiring "consideration of budgetary constraints and

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(Cont'd)

in tort or contract. However, the cases relied on by the *Reamer* court in finding municipal liability were based on breach of contract and implied warranty theories — not tort. *See Valenti v. City of Adrian*, 79 N.W.2d 885, 892 (Mich. 1973); *Holloway Constr. Co. v. State of Michigan*, 205 N.W.2d 575, 584 (Mich. Ct. App. 1973); *see also W.H. Knapp Co. v. State*, 18 N.W.2d 421, 421 (Mich. 1945) (noting that "[p]laintiff does not count on tort" in asserting its claim). Finally, while *City of Columbia, Missouri v. Paul N. Howard Co.*, 707 F.2d 338 (8th Cir. 1983) indicates that a misrepresentation claim against a Missouri city may sound in tort, Missouri's sovereign immunity law was not considered by the court. In fact, Missouri courts specifically have noted that "the doctrine of sovereign immunity precluded a cause of action ex delicto (fraudulent misrepresentation)." *See Ideker, Inc. v. Missouri State Highway Commission*, 654 S.W.2d 617, 621 (Mo. Ct. App. 1983); *see also Missouri Consol. Health Care Plan v. Cmty. Health Plan*, 81 S.W.3d 34, 37-39 (Mo. Ct. App. 2002).

economic expediency." *Id.* at 15a and 28a.[7] As the D.C. Circuit correctly noted, if WMATA were required to include "unreliable or mistaken reports indicating an inflated need for dewatering wells, for example" in its bid packages, "the reports could cause contractors to similarly inflate their bids." *Id.* at 15a. Petitioner's position "would permit endless contractor challenges to WMATA's final specifications." *Id.* Such decisions can be reviewed without resort to tort claims.

Waivers of sovereign immunity are narrowly construed. *See, e.g., Rose v.* Rose, 481 U.S. 619, 635 (1987); *Flora v. United States*, 357 U.S. 63, 65 (1958), *reh'g granted*, 360 U.S. 922 (1959), *aff'd*, 362 U.S. 145 (1960). Here, the D.C. Circuit correctly interpreted WMATA's waiver of sovereign immunity. Petitioner was permitted to argue that WMATA lied, concealed and misrepresented. And it made those very arguments to the jury. Petitioner had its day in court. The Petition does not present any good reason to give Petitioner another opportunity to reargue its case.

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7. Petitioner argues that it was improper for the D.C. Circuit to use the FTCA discretionary standard as a tool in assessing whether the challenged activity was governmental because "[n]ot all discretionary decisions are governmental, and not all governmental decisions are discretionary." Pet. at 15. In so arguing, Petitioner ignores the test employed by the D.C. Circuit in this case. As the D.C. Circuit made clear, not all discretionary acts enjoy immunity. *See* Pet. App. 10a-11a. Rather, for other than quintessential governmental functions, the court employs "a two-part test culled from the FTCA". Pet. App. 10a. Governmental discretionary acts that are not "grounded in 'social, economic, or political goals'" are not protected by sovereign immunity. *Id.* at 11a. The test employed by the D.C. Circuit was consistent with the WMATA Compact.

CONCLUSION

For the reasons stated above, this Court should deny the petition for writ of *certiorari*.

Respectfully submitted,

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IN THE

Supreme Court of the United States

KISKA CONSTRUCTION CORPORATION - U.S.A. AND KAJIMA ENGINEERING AND CONSTRUCTION, INC., PARTNERS IN KISKA-KAJIMA, A JOINT VENTURE,

Petitioners,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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INTRODUCTION

The most striking thing about WMATA's opposition brief is that it does not even *purport* to defend the D.C. Circuit's replacement of the WMATA Compact's textual governmental/proprietary distinction with the FTCA's discretionary/ministerial distinction. Instead, WMATA simply tries to change the subject, arguing that (1) KiSKA did not present this "issue" below, Opp. 5-6; (2) the dismissal of KiSKA's tort claims is at most harmless error, because KiSKA "had its day in court" on its contract claims, Opp. 3, 4, 9; and (3) the questions presented in the petition are not important in any event, Opp. 3, 8. Each of these arguments, as explained below, is manifestly incorrect. But, more important, none of these arguments negates the critical points that (1) the D.C. Circuit has concededly rewritten the express terms of the WMATA Compact, and (2) no further percolation in the lower courts on this point can reasonably be expected. Indeed, WMATA characterizes the relevant law as "settled," Opp. 2, 3, as if this Court had no business meddling in this area. That approach, if anything, underscores that this Court's review is not only warranted but overdue. The D.C. Circuit should not have the last word on the interpretation of an interstate Compact signed by sovereign States and ratified by Congress; that is the solemn "function and duty of the Supreme Court of the Nation." *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951). Because the decision below is not even arguably rooted in the text of the WMATA Compact, and the issue has been fully played out in the lower courts, this Court should grant *certiorari* and reverse the judgment.

ARGUMENT

I. WMATA's Waiver Argument Is Groundless.

WMATA begins its opposition by arguing that KiSKA "did not present the first question in its Petition to the D.C. Circuit," and thus "should not be permitted to first raise this *issue* before

the Supreme Court." Opp. 5 (emphasis added). That argument reveals a fundamental misunderstanding of appellate procedure.

WMATA does not seriously dispute that the D.C. Circuit replaced the WMATA Compact's governmental/proprietary distinction with the FTCA's discretionary/ministerial distinction in *Sanders v. WMATA*, 819 F.2d 1151, 1155 (1987), and has consistently followed that approach ever since. *See* Opp. 2-3; Pet. 15; Pet. App. 10a. Accordingly, it would have been futile for KiSKA to argue this case below under the governmental/proprietary distinction, given that the panel was bound by *Sanders* and subsequent cases to apply the discretionary/ministerial distinction. *See, e.g., In re Cheney*, 334 F.3d 1096, 1107 (D.C. Cir. 2003) (panels bound by circuit precedent). Contrary to WMATA's assertion, KiSKA did not "embrace[]" the FTCA's discretionary/ministerial distinction below, Opp. 2 n.2, 5, but simply acknowledged that distinction as binding circuit law. Needless to say, litigants are not required to engage in futile gestures to preserve an argument for this Court's review. *See, e.g., Osborne v. Ohio*, 495 U.S. 103, 125 (1990); *cf. Ohio v. Roberts*, 448 U.S. 56, 74 (1980) ("The law does not require the doing of a futile act.").

In any event, the entire premise of WMATA's argument is wrong, because WMATA overlooks the fundamental distinction between *issues* and *arguments*. The *issue* presented here is whether KiSKA's tort claims against WMATA are barred by sovereign immunity. There is no question that KiSKA presented this *issue* below: as the D.C. Circuit explained, "[o]n appeal, KiSKA argues that the district court erred by dismissing its two tort claims—fraudulent misrepresentation and negligent misrepresentation—on sovereign immunity grounds." Pet. App. 9a. What WMATA is essentially saying is that KiSKA did not present a specific *argument* in support of that issue: that the D.C. Circuit has gone astray since 1987 by analyzing WMATA's sovereign immunity from tort claims by reference to the FTCA's

discretionary/ministerial distinction rather than the WMATA Compact's textual governmental/proprietary distinction. It is axiomatic, however, that once an *issue* is properly presented, "a party can make any *argument* in support of [its position]; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) (emphasis added); *see also Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000). KiSKA is not raising a new *issue* here; it is merely raising an *argument* that was foreclosed below by settled circuit precedent.

Moreover, even if KiSKA's *argument* regarding the D.C. Circuit's interpretation of the WMATA Compact were considered a distinct *issue*, "[o]ur practice permits review of an issue not pressed so long as it has been passed upon" by the lower court. *Lebron*, 513 U.S. at 379 (internal quotation and brackets omitted); *see also United States v. Williams*, 504 U.S. 36, 41 (1992); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991); *Stevens v. Department of Treasury*, 500 U.S. 1, 8 (1991). Here, there is no question that the D.C. Circuit "passed upon" the first question presented in the petition:

> Because "the distinction between proprietary and governmental functions has created a 'quagmire that has long plagued the law of municipal corporations,'" *Beatty [v. WMATA]*, 860 F.2d [1117,] 1126 [(D.C. Cir. 1988)] (quoting *Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955)), we have interpreted section 80 "as incorporating the distinction between discretionary and ministerial functions," a dichotomy set forth in the Federal Tort Claims Act ("FTCA"), *Dant v. District of Columbia*, 829 F.2d 69, 74 (D.C. Cir. 1987). Given that "[o]nly those activities

> considered 'discretionary' are shielded by sovereign immunity," *Burkhart v. WMATA*, 112 F.3d 1207, 1216 (D.C. Cir. 1997), WMATA's immunity "turns on whether the [challenged] activity is 'discretionary' or 'ministerial,'" *Beebe [v. WMATA]*, 129 F.3d [1283,] 1287 [(D.C. Cir. 1997)].

Pet. App. 10a. If that is not "passing upon" the first question presented in the petition, it is hard to know what is. Indeed, this Court routinely reviews the decisions of lower courts bound by prior precedent. *See, e.g., City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 431 (2002); *Carter v. United States*, 530 U.S. 255, 260 (2000). Accordingly, WMATA's waiver argument is groundless.

II. WMATA's Harmless-Error Argument Is Groundless.

WMATA next argues that any error in dismissing KiSKA's tort claims is harmless, because KiSKA already "had its day in court" by receiving "a five-week trial on its contract claims," which were "predicated on the same facts" as its dismissed tort claims. Opp. i, 1, 3, 4, 9. Under this view, "[a] party alleging concealment has a clear remedy for that claim," Opp. 7: it can sue in contract, not tort. That argument too is baseless.

As an initial matter, the D.C. Circuit did not address WMATA's harmless-error argument below; to the contrary, that court affirmed the dismissal of KiSKA's tort claims *on the merits* and expressly declined to reach that argument. *See* Pet. App. 16a n.14. Accordingly, the D.C. Circuit's ruling on the tort claims is squarely presented here, and WMATA's harmless-error argument provides no basis for insulating that ruling from this Court's review.

In any event, the argument fails on its own terms. KiSKA's tort claims allege that WMATA wrongfully induced KiSKA to *enter into* the contract by concealing and/or misrepresenting material facts. Thus, as a matter of law and logic, it makes no

sense to say that the exclusive remedy for those claims lies *under* the contract: the tort of fraudulent inducement of a contract is separate from, and antecedent to, any breach of that contract. *See, e.g., McDonald v. Johnson & Johnson*, 776 F.2d 767, 768 (8th Cir. 1985) (characterizing the argument that an adverse contract verdict precludes a fraudulent-inducement verdict as "bordering on the frivolous"). Whether a defendant breached its obligations under a contract simply has nothing to do with whether the defendant fraudulently induced the plaintiff to enter into the contract in the first place.[1]

WMATA's insistence that the "same facts" underlie both KiSKA's tort and contract claims, Opp. 1, is meaningless. KiSKA's dismissed tort claims involve different elements and different defenses than its adjudicated contract claims, so that KiSKA did not need to prove that WMATA breached the contract in order to prove fraud, and, conversely, KiSKA did not need to prove that WMATA committed fraud in order to prove a breach. Whether some of the same evidence may have supported both claims is legally irrelevant. *Cf. United States v. Felix*, 503 U.S. 378, 386 (1992) (reliance on same evidence irrelevant in determining whether subsequent prosecution barred by double jeopardy). Because the jurors here returned a general verdict, there is no way of knowing why they rejected KiSKA's contract claims, and thus "it is not clear" whether they addressed any (much less all) of the issues presented in the dismissed tort claims. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 799 (1973); *cf. United States v. Watts*, 519 U.S. 148,

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[1] WMATA tries to blur the record on this point by asserting that the D.C. Circuit "*expressly found* that 'the covenant of good faith and fair dealing undoubtedly constrains WMATA's behavior within the context of its contractual relationships.'" Opp. 7 (emphasis added; quoting Pet. App. 12a). That assertion is false. Indeed, the D.C. Circuit said just the opposite: "*Although* the covenant of good faith and fair dealing undoubtedly constrains WMATA's behavior within the context of its contractual relationships, *KiSKA's misrepresentation claims sound in tort, not contract*." Pet. App. 12a (emphasis added).

155 (1997) ("[T]he jury cannot be said to have 'necessarily rejected' any facts when it returns a general verdict.").

Indeed, WMATA's current insistence that this case is all about contract, not tort, stands in stark contrast to its position below that this case is all about tort, not contract. When urging the district court to dismiss the tort claims on sovereign immunity grounds, WMATA insisted that *all* of KiSKA's claims sounded in tort, not contract. "Each count of KiSKA Kajima's complaint lies in tort or is derivative of an allegation that lies in tort." WMATA's Reply To Pls.' Opp. To Mot. To Dismiss (10/26/99), at 16; *see also id.* at 17-18 ("KiSKA-Kajima is not attempting to hold WMATA to its contract, but, as KiSKA-Kajima admits, its claims are 'grounded in fraud and misrepresentation.' These are not breach claims, but rather tort claims masquerading as such. ... KiSKA-Kajima is attempting to maintain an action in tort, and as alternative grounds has dressed up its allegations as a contract claim."). It may suit WMATA now to change its tune as a matter of litigation tactics, but it cannot change the law. The jury's rejection of KiSKA's contract claims in no way forecloses KiSKA from pursuing relief in tort.

III. WMATA's Attempts To Downplay The Importance Of This Case Are Groundless.

WMATA finally attempts to downplay the importance of the questions presented in the petition on a variety of grounds, all of which are meritless.

First, WMATA contends that this Court's review is unwarranted because "there is no split in the federal circuits." Opp. 6. But the whole point of waiting for a circuit split is to allow further percolation in the lower courts that will help flesh out an issue, and highlight competing viewpoints, to facilitate this Court's ultimate review. Here, no such percolation can reasonably be expected because, as a practical matter, the questions presented arise only in the Washington D.C.

metropolitan area, and the Fourth Circuit, *over a vigorous dissent*, recently decided to follow the D.C. Circuit in construing the WMATA Compact precisely to avoid a circuit split. *See Smith v. WMATA*, 290 F.3d 201, 207 & n.9 (4th Cir. 2002); *id.* at 219-20 (Michael, J., dissenting); *see also McKethean v. WMATA*, 588 A.2d 708, 712-13 (D.C. 1991) (reversing prior precedent and following the D.C. Circuit on this point because "[w]hether an activity is proprietary or governmental [within the meaning of the Compact] is a question of federal law"). The competing positions have thus been fully fleshed out in the lower courts, and the issue is ripe for this Court's review. Indeed, if WMATA's self-serving perception of the law as "settled" is to be credited, Opp. 2, 3, the issue may be *overripe*. Certainly, this Court should not allow an explicitly anti-textual interpretation of an interstate Compact to become the law of the land by default. *See, e.g., Demarest v. Manspeaker*, 498 U.S. 184, 190 & n.* (1991) (granting *certiorari* and reversing notwithstanding circuit-court unanimity on point); *McNally v. United States*, 483 U.S. 350, 355 (1987) (same).

Second, WMATA contends that this Court's review is unwarranted because "the Petition presents an unusual and unique issue limited to a single, local governmental entity—WMATA." Opp. 8. This "don't-mind-little-old-WMATA" approach is preposterous. WMATA is not just a run-of-the-mill "local governmental entity," but the creature of an interstate Compact among the District of Columbia, the State of Maryland, and the Commonwealth of Virginia that was duly ratified by the Congress of the United States pursuant to the Compact Clause of the Constitution, Art. I, § 10, cl. 3. WMATA is a frequent litigant in the lower courts, and, as noted in the petition, the scope of its tort liability is a recurring issue. *See* Pet. 13-15, 18-19. So it is simply not true that the questions presented here have "very limited application," Opp. 3, even with respect to WMATA. *Cf. Hess v. Port Authority Trans-*

Hudson Corp., 513 U.S. 30, 32-33 (1994) (granting review to address the sovereign immunity of a particular bistate railway created under the Compact Clause). But the questions presented here extend well beyond WMATA: they call upon this Court to clarify the appropriate judicial role in interpreting interstate Compacts, and the scope of "governmental" and/or "discretionary" sovereign immunity in the context of quasi-governmental entities. *See Amicus* Br. of the General Contractors Ass'n of New York, Inc. at 2 (underscoring the importance of these issues to government contractors).

Third, WMATA contends that this Court's review is unwarranted because WMATA predicts that it would prevail on KiSKA's tort claims in any event. *See* Opp. 2, 8-9. According to WMATA, the information withheld from KiSKA during the bidding process was not "material," and consisted only of "superceded" [*sic*] "draft reports" that "had been made available for review" in any event. Opp. 2 n.3. But that is just wishful thinking. There have never been any findings along those lines, and KiSKA vigorously contests WMATA's self-serving characterization of the facts. The issue here is not which party ultimately might prevail on the merits; it is whether KiSKA is entitled to litigate its tort claims in the first place.

Fourth, WMATA contends that this Court's review is unwarranted because the D.C. Circuit simply applied the principle that "[w]aivers of sovereign immunity are narrowly construed." Opp. 9. But the problem here is not that the D.C. Circuit "narrowly" construed the WMATA Compact's waiver of sovereign immunity; it is that *the D.C. Circuit did not construe the WMATA Compact's waiver of sovereign immunity at all*, but instead construed the FTCA's waiver of sovereign immunity. Under no circumstances can "discretionary" activity be considered a "narrow" construction of "governmental" activity; to the contrary, some discretionary activities are non-governmental, and some governmental activities are non-discretionary. The two concepts are simply different in origin

and meaning. *See, e.g., Indian Towing*, 350 U.S. at 68 (distinguishing between FTCA's discretionary/ministerial distinction and common-law governmental/proprietary distinction); *Owen v. City of Independence*, 445 U.S. 622, 644-50 (1980) (same).

Finally, WMATA contends that this Court's review is unwarranted because the D.C. Circuit correctly applied the discretionary/ministerial distinction by holding that WMATA has "discretion" to conceal material information from its contractors to induce artificially low bids, and that the exercise of such "discretion" is grounded in policy considerations. Opp. 8-9. WMATA does not deign, however, to respond to any of the contrary arguments raised in the petition, *viz.*:

> (1) the D.C. Circuit reversed the burden of proof by requiring KiSKA to prove that WMATA's challenged conduct was *not* discretionary rather than requiring WMATA to prove that such conduct *was* discretionary, Pet. 20-21;
>
> (2) the D.C. Circuit's interpretation of the discretionary/ministerial exception is inconsistent with the FTCA's *separate* exception to the waiver of sovereign immunity for "[a]ny claim arising out of ... misrepresentation, deceit, or interference with contract rights," 28 U.S.C. § 2680(h), Pet. 21-22;
>
> (3) the D.C. Circuit's conclusion that WMATA has "discretion" to conceal material information from contractors ignores a solid wall of precedent holding that governmental entities have *no* such discretion, not to mention a specific provision of a Federal Transit Administration Circular providing that WMATA's contract solicitations must "[i]ncorporate a clear and accurate description of the technical requirements for the material,

product, or service to be procured," FTA Circular 4220.1D ¶ 8(c)(1), Pet. 22-24 & n.4; and

(4) in any event, even if WMATA had "discretion" to conceal material information from its contractors, such "discretion" would not implicate the exercise of a legitimate policy choice protected by sovereign immunity, Pet. 24-25.

Rather than responding to a single one of these points, WMATA simply parrots the D.C. Circuit's assertion that KiSKA's position "'would permit endless contractor challenges to WMATA's final specifications,'" Opp. 9 (quoting Pet. App. 15a), as if the WMATA Compact's waiver of sovereign immunity were to be analyzed solely by reference to WMATA's convenience.

The bottom line here is that the D.C. Circuit has essentially written the limited waiver of sovereign immunity for tort claims out of the WMATA Compact. Because that result has no arguable basis in the text of the Compact itself, gives WMATA *carte blanche* to commit fraud, and cannot reasonably be expected to be remedied through further percolation in the lower courts, this Court should grant review.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, this Court should grant review.

Respectfully submitted,

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